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EDITORIAL

Dear Readers,

The launch of a new volume of the Polish Yearbook of International Law (PYIL) occurs at time in a history characterized by dramatic volatility and profound uncertainty of the future of the international legal order. The world is witnessing a rapid succession of crises (called by some "polycrisis") that not only test the resilience of global institutions but threaten to destroy the fundamental principles established by states over the past eighty years.

The most serious and undeniable challenge remains the full-scale, unprovoked Russian aggression against Ukraine. This conflict is not merely a regional dispute; it is a clear-cut, massive violation of the bedrock prohibition on the use of force, serving as a reminder of the catastrophic consequences when a permanent member of the Security Council disregards the United Nations Charter and international law. The enduring aggression, which has been ongoing since 2014, highlights the limitations of the existing collective security framework and calls for a deep, critical re-evaluation of enforcement mechanisms. While the tragedy in Ukraine demands international attention, similar humanitarian and legal challenges are unfolding elsewhere, further straining the capacity of international law to maintain order and protect human rights. The International Court of Justice (ICJ) has recently weighed in on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, prompting a re-examination of core concepts like jus cogens.

In parallel with these devastating conflicts, the architecture of global governance is facing systemic strains from a shifting geopolitical landscape. We observe a dramatic reassessment by major powers, notably the United States, regarding its engagement with the multilateral legal order. The pendulum of policy appears to swing from robust institutional participation to a more transactional, skeptical approach that prioritizes national sovereignty and (short-term) domestic interests over collective action and international institutional commitment. This shift has created an environment of increased legal ambiguity, where the very expectation of adherence to established norms is diminished, leading to what some term a "geoeconomic

competition between states." The perception that international law is optional for the powerful, rather than binding for all, erodes its authority and practical efficacy.

This constellation of crises – the overt disregard for the prohibition on force, the humanitarian catastrophes that follow, and the fracturing of multilateral consensus – might suggest a fatal decline of international law. However, the opposite is true: it is precisely in these moments of maximum peril that the need for international law is greater than ever before. International law is the indispensable framework for accountability, articulating norms of conduct, and offering pathways out of perpetual conflict and disorder. Without it, the world risks collapsing into a Hobbesian state governed solely by power and national interest. The scholarly work contained in this volume is a necessary and timely contribution to this essential project: to analyze, critique, and ultimately reinforce the rules-based international order.

The first section of this volume ("General Articles") is structured to lead the reader from fundamental theoretical inquiries to specific, pressing contemporary challenges. This is followed by the part dedicated to EU law. This sequence reflects the interconnectedness of general principles, specialized fields, and regional integration projects.

The volume therefore begins with the text by Lucas Lixinski ("Resisting Chrononormative International Law"), which argues that engagement with time in international law requires unpacking the contingent memories and imaginaries that underpin legal regimes, using International Cultural Heritage Law as a case study. Maurizio Arcari, in his "Divisive jus cogens reloaded...", submits that limiting the peremptory effect of the right to self-determination (as discussed in the ICJ's 2024 Advisory Opinion) risks undermining the unitary, universal character of *jus cogens*. Moving to conflict issues, Kristýna Urbanová ("Validity of a potential Peace Treaty between Ukraine and Russian Federation...") examines the legal validity of a potential peace treaty between Ukraine and Russia under Art. 52 of the Vienna Convention on the Law of Treaties, which voids treaties procured by the threat or use of force.

Milan Lipovský, in his "Suitability of the principle of non-intervention...", analyzes whether the principle of non-intervention is suitable for governing cyber information operations aimed at influencing another state's elections. Hanna Kuczyńska and Andriy Kosylo, in "The Long-awaited Breakthrough Legislation...", ask whether the new Ukrainian criminal law, introduced due to the ratification of the Rome Statute, fully implements international standards regarding the elements and definitions of international crimes. Jan Denka, in "The Enforcement of the International Covenant on Economic, Social and Cultural Rights by the Administrative Courts...", reveals that Polish and Czech administrative courts share significant similarities in enforcing ESC rights under the ICESCR, with compa-

rable shortcomings in both jurisdictions. Markiyan Malskyy ("Current State and Future of Investor-State Mediation") discusses the criticism of ISDS arbitration and highlights developments, such as the Singapore Convention, aimed at increasing the use of investor-state mediation as an alternative dispute resolution mechanism. Julia Sochacka, in her "Recognition and enforcement of arbitral awards in Egypt, Saudi Arabia and Iraq…") provides a comparative outlook on the recognition and enforcement of arbitral awards in these three states to determine if there is a region-specific approach to international arbitration in West Asia and North Africa.

The final part of this section focuses on European law. It starts with Andrzej Wróbel's thought-provoking article ("An Axiological Turn in European Constitutionalism?") in which he argues that we witness the paradigm shift in EU law towards a "Union of values". Agnieszka Sołtys, in her "Equality of Member States as a new rationale for the principle of primacy", assesses the CJEU's new justification for the principle of primacy based on the equality of Member States before the Treaties, viewing this axiological argument as crucial for strengthening the constitutionalisation of EU law. Patrycja Dąbrowska-Kłosińska ("Free movement of people") argues that increased re-regulation at the EU level does not necessarily lead to better protection and enforcement of fundamental rights for individuals at the intersection of health protection and freedom of movement during the pandemic. Raquel Cardoso and Vasil Pavlov ("The effectiveness of the European approach to irregular migration") evaluate the effectiveness of the EU's twofold approach to irregular migration: the criminalisation of migrant smuggling and the externalisation of migration policy. Ewa Bujak ("Escaping into economic security…") looks at the EU's use of foreign direct investment screening as an instrument to protect its strategic autonomy in times of crises. Finally, Edgar Drozdowski ("Effectiveness and constitutional standards…") argues that Polish constitutional standards for the protection of taxpayers' rights conflict with and hinder the proper implementation of the European General Anti-Abuse Rule derived from the ATA Directive.

The volume concludes with our two traditional sections. The first one ("Polish Practice") features a selection of judgments of the Polish Supreme Administrative Court relating to public international law. This selection offers invaluable primary material for scholars and practitioners seeking to understand how Poland's highest administrative judiciary applies and interprets international law and the provisions of EU law within the domestic legal order. We hope that the cooperation with Supreme Administrative Court in the selection of judgements for dissemination will be permanent, and that over time, we will be able to expand this section to include rulings from other Polish highest courts. The second section ("Book Reviews") provides a critical overview of selected current scholarship in the field. We review *Euphony, Harmony and Dissonance in the International Legal Order* (by

Maciej Taborowski); *WTO. System und Funktionsweise der Welthandelsordnung* (by Anna Czaplińska); *Teaching International Law* (by Łukasz Gruszczyński); and *Intentional Destruction of Cultural Heritage and the Law: A Research Companion* (by Marcin Marcinko).

Last but not least, in terms of our organizational developments, we are pleased to announce that the Polish Yearbook of International Law has been added to the Italian list of Class A-journals, which confirms its high academic standards and international recognition.

We believe that the latest volume presents a powerful body of evidence demonstrating the continued, indeed crucial, necessity of rigorous legal scholarship in these turbulent times. The articles collectively affirm that international law is not a passive casualty of geopolitical shifts but an active and vital terrain upon which the conflicts of values, power, and security are fought. From the conceptual battles over chrononormativity and the peremptory force of jus cogens, to the practical challenges of regulating cyber conflict and enforcing economic rights, the contributors offer both critical perspectives and concrete solutions. They remind us that the work of strengthening the international legal order is an ongoing, difficult, and non-negotiable task. We trust that this volume will provide both illumination and impetus for those dedicated to ensuring that the rule of law, rather than the rule of force, guides the destiny of the international community.

Karolina Wierczyńska,
Łukasz Gruszczyński

GENERAL ARTICLES

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Lucas Lixinski[*]

RESISTING CHRONONORMATIVE INTERNATIONAL LAW

Abstract: *This article argues that better engagement between international law and time requires us to unpack the contingent memories and imaginaries that underpin international legal regimes and processes. We as a field need to move away from thinking of time as static and linear. International Cultural Heritage Law (ICHL) is an ideal case study to think through these relationships, given the subfield's connection to identity and its relative openness to different epistemologies. This article assesses the work that time does in shaping international law, working through the three linear dimensions of time (past, present and future) to highlight the limits of international law, and in shaping the heuristics of these three linear dimensions. ICHL offers a pathway to simultaneously showcase the shortcomings of our international legal understandings of time (which I dub chrononormative), and to imagine different possibilities that better advance the human goals that should be the foundation and the goal of international legal norms and regimes.*

Keywords: time and international law, cultural heritage law, linearity, static time, intangible cultural heritage

INTRODUCTION

Time can be static when we take a snapshot of time, complete and knowable and beyond re-negotiation. Received wisdom in international law often assumes time to be static, or at least that international law works towards static time as a means of creating or ensuring stability.[1] Static time is inexorable, linear and con-

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[1] K.P. Van der Ploeg, *International Law Through Time: On Change and Facticity of International Law*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 325.

stant. International law profits from this view in order to make itself more stable. The default rule in international law is that treaties do not retroact, for instance. This baseline renders international rules more stable. It also means that situations that inform the negotiation of the treaty will not necessarily be affected by it, because they happened before the treaty entered into force. In this way, we render the past static and beyond the reach of international law, but the disputes that made a treaty possible do not go away. In this article, I seek to question the assumption of time's linearity in international law, and to show that our impulse towards static time in fact forces instability in international law.

In attempting to render the international legal order more stable for states, international lawmakers make decisions on the design and implementation of international legal rules that compromise certain commitments to memory and identity for non-state actors, such as sub-state communities and individuals. For those communities and individuals, international law organises their identities with a view to being effective for someone else, assuming a linear and stable relationship with time that I dub *chrononormative*.[2] Chrononormativity is the idea that time can be rendered static by an authorised capture of identity at a specific point (whether in the past, present or imagined future). This static version of time operates in a linear and ordered fashion that aims to be in some respects timeless. International law authorises and enforces narratives for (often Eurocentric) national projects that, by erasing contingencies for the sake of stability, creates sources of instability that arise when international law is deployed by communities and individuals to prosecute claims on the basis of memory and identity that are neither stable nor linear. As the law assumes time, it therefore ignores the co-production of law and time in ways that create a façade of stability which ultimately generates instability.

In other words, a normative idea of time serves the interests of those who create international law, but not necessarily those who international law is meant to serve. As we seek to select and authorise memory for the purposes of narrating international orders and the need for them, international law often turns to processes that identify markers of memory in order to crystallise those tensions and, in a way, render them static and open for capture for international law-making purposes. The capture of cultural heritage as a regulatory object is a choice path for selecting[3] and authorising[4] these memories in favour of alternately (and often simultaneously) cosmopolitan and nationalistic projects and narratives. Cultural heritage is in this

[2] I rely on insights from queer theory, as well as feminist and post-colonial thinking, to develop this concept. See a fuller discussion in Part II below.

[3] L. Lixinski, *Selecting Heritage: The Interplay of Art, Politics and Identity*, 22(1) European Journal of International Law 81 (2011).

[4] L. Smith, *Uses of Heritage*, Routledge, London: 2006.

sense a physical[5] or non-physical[6] manifestation of memory that builds into national projects of commemorating or decrying a past so as to shape the nation's identity. Cultural heritage is essential in the processes of nation-building, as it helps generate a relatively stable idea of a shared past that creates a platform for a society to come together at a certain (present) moment in time to make choices about its future.

Besides national impulses for protection, there have been significant international efforts to also safeguard cultural heritage, particularly since the end of the World War II. International cultural heritage law (ICHL) in this sense is also the process of selecting a manifestation of a memory as a collective cultural practice or artefact and attaching legal consequences to this selection. ICHL selects a practice or artefact from the past, in the present, with a view towards impacting a future. It reinforces and authorises the view of heritage practices as "the present select[ing] an inheritance from an imagined past for current use and decid[ing] what should be passed on to an imagined future."[7] As such, ICHL engages multiple dimensions of time. Because of ICHL's role in manipulating identity across different aspects of time, it presents a very fertile platform from which to discuss the relationship between time and international law. ICHL assumes chrononormative renderings of international law as relying on static snapshots of time in a linear fashion, and in fact enforces them to benefit a stable national identity that can lead to lasting peace through cultural understanding.

I refer to the three linear dimensions of time – past, present and future – to show how limiting and problematic they can be. Examining these three dimensions of time in relation to ICHL through specific case studies, I show that time does more analytical work in creating and perpetuating international legalities than we often acknowledge, and that this work is often pursued through the politics of memory. Instead of relying on static time to erase contingency in favour of a single controlled narrative of international legality, I wish to show that multiple timelines make for better international legal outcomes and identities for those individuals and groups whom international law aims or should aim to serve. I work on the premise that international law serves

[5] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231; Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC); Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 2562 UNTS 3 (UCHC).

[6] Convention for Safeguarding of the Intangible Cultural Heritage 2003 (adopted 17 October 2003, entered into force 20 April 2006), 2368 UNTS 3 (ICHC).

[7] J.E. Tunbridge, G. Ashworth, *Dissonant Heritage: The Management of the Past as a Resource in Conflict*, J. Wiley, Chichester: 1996, p. 6.

human beings and communities, rather than states as abstract entities which are meant to represent human groupings, but often fail to do so. That fact that a primary objective of ICHL is to contain and narrate memory is an additional reason why it is ideally placed to study the relationships between time and international law.

I therefore argue that a stronger engagement between international law and time necessitates an unpacking of the contingent memories and imaginaries upon which international legal regimes in general are based and their contribution to perceived static time, as ICHL demonstrates. Unpacking these contingencies through an analysis of ICHL's engagement with time showcases how international legal regimes at large work to freeze time, often to the detriment of that which the law seeks to safeguard. It also further exposes the Eurocentric legacies of international law and the political and epistemic choices these legacies foreground and foreclose. In making a choice to freeze time for the sake of stability, international law can also in fact create instability. A critique of chrononormative international law exposes these shortcomings, and tells us that it is feasible (and, in fact, desirable) to pursue international legal ordering projects with multiple parallel visions of time, memory and identity operating simultaneously. This thicker engagement I propose can nurture the emancipatory potentials of international law that have thus far remained largely elusive, helping reimagine international law as a stronger catalyst for change, rather than an authoriser of the status quo. This argument matters because it exposes assumptions about the work that time performs for the social ordering function of international law, which is rather central to the law's overall mandate to society. It contributes to existing knowledge by foregrounding the work of identity in our analysis of the relationships between time and international law, as well as by reconciling the insights of queer,[8] feminist,[9] racial[10] and post-colonial[11] theories, which have for the most part eluded the intersection of time and international law. Bringing those insights to bear refocuses the work of international law on the individuals, communities and groups it aims to serve, rather than the service of legal structures for their own sake.

To be sure, I do not assume that all international law is always linear. But I do assume that it is often based on some sort of linear engagement with time as part

[8] For a recent collection of essays, many of which tackle time (and intersections with colonialism), *see* C. O'Hara, T.P. Paige (eds.), *Queer Engagements with International Law: Times, Spaces, Imaginings*, Routledge, Abingdon: 2025.

[9] *See* M. Hansel, *Feminist Time and an International Law of the Everyday*, in: S.H. Rimmer, K. Ogg (eds.), *Research Handbook on Feminist Engagement with International Law*, Edward Elgar Publishing, Cheltenham: 2019, p. 379.

[10] *But see e.g.* N. Tzouvala, *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law*, 2 Journal of Law and Political Economy 226 (2022).

[11] B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8(2) Melbourne Journal of International Law 499 (2007).

of the narratives of progress that underpin so much of international law.[12] Further, I do not assume that non-linear time holds all the answers, and is necessarily and intrinsically a liberating move. But I present non-linear time as largely liberating and emancipatory as a counterpoint, a mock-up of what international law could be or do if it were possible to think about time in more plural ways.[13] To present non-linear time, I rely on the voices of queer, feminist, post-colonial and race thinkers and advocates. Together, they mount a vigorous (and I suggest compelling) critique of Eurocentric or linear time.

In what follows, I use ICHL as a primary case study for the reasons I noted above, but I also intersperse examples from elsewhere in international law to demonstrate the analytical purchase of the arguments I weave on the basis of ICHL. I first unpack how chrononormativity relates to identity and primes it for capture by international law-making. The following three sections unpack the past, present and future dimensions of time in international law, noting instability-causing inconsistencies. The subsequent section engages further with the idea of stability through international law, and whether stability through synchronicity should be a desirable goal of justice-orientated international legal projects. Concluding remarks follow these sections.

1. CHRONONORMATIVE TIME AND IDENTITY

Time is a catalyst to turning a group of individuals into a society, a nation and a socioeconomic class by allowing for the reinforcement of social bonds, shaped at the service of a shared interest that is also identified over time.[14] This effect is what queer theorist Elizabeth Freeman calls "chrononormativity".[15] It assumes linear time (in that it progresses sequentially through past, present and future) and timelessness (a consequence of the static treatment of the past and present as an immutable snapshot that projects across the three sequential and linear dimensions) as a regulatory mechanism for identities.

Identities, on the other hand, are more malleable for individuals and groups. As such, they are "trafficked in signs of fractured time", in that they challenge the idea of time as linear, sequential or based on immutable or static snapshots of identity and memory.[16] Identities change, as do the political preferences associated with them, and therefore they undermine the possibility of static moments as the basis for deci-

[12] T. Skouteris, *The Notion of Progress in International Law Discourse*, TMC Asser Press, The Hague: 2010.

[13] On the use of non-linear time to reimagine international law in another context, *see* Tzouvala, *supra* note 10, pp. 231–236.

[14] E. Freeman, *Time Binds: Queer Temporalities, Queer Histories*, Duke University Press, Durham: 2010, p. 3.

[15] *Ibidem*.

[16] *Ibidem*, p. 7.

sion-making. This relationship with time is symptomatic of anachronisms that linger from past events, and even manifest as forms of arrested development of identity.[17] A similar effect happens with cultural heritage and its international legal regulation, to the extent that cultural heritage in the law is a form of lingering anachronistically in a past, and this anachronism justifies purportedly apolitical engagements with the past as history, or as truth, in ways that prevent changes to (national) identity or challenges to the dominant narratives on heritage. Since heritage, once listed following a legal process, is assumed to be listed forever, the meaning attributed to that heritage in the law is not susceptible to change, even if society itself changes.

Laurajane Smith has famously described these practices as "authorized heritage discourse", and they are well documented in heritage studies.[18] Authorized heritage discourse is the idea of cultural heritage being shaped by a set of practices and ideas that validate the political preferences of certain stakeholders to preserve heritage as static and immutable at the expense of the preferences of communities that create heritage and inevitably change it. To bring but one example of engagement with cultural heritage as history, think of the movements for removing Confederate monuments in the United States,[19] or other forms of rejecting contested racist monuments. While proponents call for removing these monuments as a way of renewing our engagement with the past,[20] those who seek to keep them in place use the law (heritage law, but also criminal law that prohibits disfigurement of public property in some instances) to shore up an argument about the immutable historical truth these monuments embody, and thus indirectly the collective identity they represent – and should, in their view, continue representing.[21] Proponents of their removal instead call for different identities to be foregrounded and considered. In other words, the law enables chrononormative engagements with identity to the extent that the law sees time, and the identities produced at one point in time, as rather static or immutable commitments to a certain past. With few exceptions (which I turn to below), the law sees this identity as safeguarding a specific (and often triumphant) past of the nation as a means to consolidate identity and the nation-state with it.

Cultural heritage, however, much like any type of identity-producing process, is not static. The heritage the law pursues and the heritage with which people en-

[17] *Ibidem*, p. 8.

[18] Smith, *supra* note 4.

[19] E.L. Thompson, *Smashing Statues: The Rise and Fall of America's Public Monuments*, W.W. Norton & Company, New York: 2022.

[20] *AHA Statement on Confederate Monuments*, American Historical Association, August 2017, available at: https://www.historians.org/news-and-advocacy/statements-and-resolutions-of-support-and-protest/aha-statement-on-confederate-monuments (accessed 30 June 2025).

[21] Thompson, *supra* note 19; L. Lixinski, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Cambridge University Press, Cambridge: 2021.

gage are often dissonant, in other words. While the law insists on freezing a certain snapshot for consumption and aggrandisement of an immutable heritage, critical heritage studies has long agreed that heritage only exists because of the way people relate to it, which is bound to change.

Cultural heritage is also not about a truth; it is the selection of an artefact of history to foreground one narrative and project it into the future. While this narrative of the past may be a slice of the truth, its projection onto the future may shift and lose its appropriateness. Just as cultural artefacts more generally, heritage embodies not only historical data, but also "the traces of bodies and knowledges implicit in their preservation."[22] These traces signal affective relationships with heritage which are inherently mutable,[23] as is memory in general,[24] and specifically the memories which heritage evokes.[25] In other words, cultural heritage is about myth-making.[26] Once we let go of the idea that heritage is about truth, and understand that it is about myths and "registers of [...] possibility",[27] this insight liberates us from being beholden to the past. This liberation allows us to also think about time in non-linear ways, changing the progression of time from past through present and towards the future. Heritage stops being about the past as a static snapshot that linearly progresses onto the present and the future. It allows us to pause and ponder the implications of how Confederate monuments, for instance, were generally erected not as direct responses to the end of the Civil War in the United States, but as rebukes to the gains of the Civil Rights movement a century later. This realisation is only possible by thinking about the past in cyclical, rather than linear, ways, and about how it is leveraged to pursue present political projects with an impact on the future. Heritage thus becomes visible as a selection process that can, for instance, actively start with a future in mind and then select a narrative about the past that actively prosecutes that desirable future.

To be fair, the staticity of heritage and identity has been queried within international law itself. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, for instance, is very clear that this type of heritage "is constantly recreated."[28] This treaty is designed to safeguard living cultural heritage as social

[22] E. Madden, *The Queer Contemporary: Time and Temporality in Queer Writing*, in: P. Reynolds (ed.), *The New Irish Studies*, Cambridge University Press, Cambridge: 2020, p. 129.

[23] On affect and heritage, *see* L. Smith, M. Wetherell, G. Campbell (eds.), *Emotion, Affective Practices, and the Past in the Present*, Routledge, London: 2018.

[24] R.M. Van Dyke, *Durable Stones, Mutable Pasts: Bundled Memory in the Alsatian Community of Castroville, Texas*, 24 Journal of Archaeological Method and Theory 10 (2017).

[25] D.C. Harvey, *Heritage Pasts and Heritage Presents: Temporality, Meaning and the Scope of Heritage Studies*, 7(4) International Journal of Heritage Studies 319 (2001), p. 320.

[26] D. Lowenthal, *The Heritage Crusade and the Spoils of History*, Cambridge University Press, Cambridge: 1998.

[27] Madden, *supra* note 22, p. 131.

[28] Art. 2(1) ICHC.

practices, rituals and ways of seeing the world and the universe that belong to communities and only matter as heritage to the extent that this connection to the community is maintained. Because of the importance of maintaining an active connection to a community, the Convention's own definition of intangible heritage determines that this heritage is meant to change over time. But this treaty, despite being the latest heritage treaty under UNESCO and harbouring ambitions to re-imagine more broadly the relationship among law, cultural heritage and identity,[29] is yet to have that type of impact. The practices of international heritage law and management still insist primarily on static or immutable heritage under a strict conservation paradigm that closely follows authorized heritage discourse.[30]

Chrononormative identity (and the heritage that embodies it) is therefore largely static, even if it need not be so. Cultural heritage law, domestic and international, enables static time and heritage. Another effect of chrononormative identity, heritage and international law more broadly is its linearity, which is often tied to certain narratives of progress.[31]

Narratives of progress are pervasive and co-occurring in international law and political discourse. For instance, in political discourse, the movement of persons through migration, much like the movement of heritage artefacts in the trafficking of cultural objects, is often assumed "as a natural temporal shift from the past to the present, from an anachronic to a postmodern temporality, whereas counterflux [movement] often gets framed as a backward move in global time."[32] To use an example from elsewhere in international law, this assumption of progress is embodied in the law when it assumes that the movement of migrants is from poorer to wealthier countries, for instance, and that this movement is a burden on those wealthier countries, disregarding the contributions that those migrants make to the receiving countries through their identities.[33] In international cultural heritage law specifically, the inclination to privilege this direction of movement is exemplified in John Henry Merryman's argument in defence of the British Museum's retention of the Greek Parthenon Marbles and other similar movements of cultural heritage,

[29] J. Blake, L. Lixinski, *Conclusions: Tightropes of the Intangible Cultural Heritage Convention*, in: J. Blake, L. Lixinski (eds.), *The UNESCO 2003 Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford: 2020, p. 487.

[30] L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford: 2019.

[31] *See generally* Skouteris, *supra* note 12.

[32] E. Ávila, *Decolonizing Queer Time: A Critique of Anachronism in Latin@ Writings*, 70(1) Ilha do Desterro 39 (2017), p. 39.

[33] P. Werbner, *Migration and Culture*, in: M.R. Rosenblum, D.J. Tichenor (eds.), *Oxford Handbook of the Politics of International Migration*, Oxford University Press, Oxford: 2012, pp. 221–230.

under the assumption that heritage will be best preserved, for the benefit of all of humanity, in those countries.[34]

The linearity of time assumes that "how one relates to the past, present, or future [...] has significant implications for how one delineates, instrumentalizes, and 'speaks' the political", and that "[s]truggles over the experience and organization of time" are central to law and politics.[35] Whether certain acts happened before or after the adoption of relevant international instruments, for instance, means the difference between the redress or tacit validation of those wrongful acts. Therefore, deciding on the validity of the law in terms of a "before and after" has clear implications for whether international law offers a solution or an endorsement of the harms experienced, most notably as a result of colonisation. Indeed, international law supports a structure of time that speaks to "first in Europe, then elsewhere",[36] the effect of which is to assume that those places where things happen differently from Europe operate in that way because they are behind, and moving inexorably towards Europe. In other words, linear chrononormative international law corresponds to a temporal analysis and endorsement of Eurocentrism. Chrononormative international law thus repels attempts at thinking of time using non-European epistemologies. It prevents Indigenous peoples, for instance, from claiming the return of human remains housed in museums around the world, supporting a Eurocentric claim that these remains were "collected" when there was no international law requiring restitution, and overlooking the fact that, for Indigenous communities, the harm of those ancestral remains being housed outside the purview of their communities is present and ongoing and affects the future of these communities.

To counter this position of critique, an alternative might be to further radicalise multiple temporalities.[37] To do so entails understanding that globalisation, as a homogenising force, also acts upon time, and that in effect "the spatial expansion of capitalist modernity, forcing what is different and separate together, synchronically", also cancels differences in historical times across places.[38] The same happens with international law, when analyses of time in international law assume international law as an inescapable universalising force.[39] There are different ways of seeing time,

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[34] J.H. Merryman, *Thinking about the Elgin Marbles*, 83 Michigan Law Review 1881 (1984–1985).

[35] S.M. Hawthorne, *At the Edge of Time: Postcolonial Temporalities in An Intimate Encounter*, 7(2) Journal of Africana Religions 291 (2019), p. 296.

[36] D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton University Press, Princeton: 2000, p. 8.

[37] S. Helgesson, *Radicalizing Temporal Difference: Anthropology, Postcolonial Theory, and Literary Time*, 53 History and Theory 545 (2014), p. 545.

[38] *Ibidem*, p. 548.

[39] C. Tomuschat, *The Relevance of Time in International Law*, 41 Polish Yearbook of International Law 9 (2021), pp. 10–11.

with different underling premises and contingencies.[40] The politics of memory operate to highlight many of these contingencies.[41] The politics of memory as an analytical starting point acknowledges that time operates across multiple contingencies that cannot be reduced to fairly straightforward historical methodological categories, and are instead continuously evolving in how they shape and lend meaning to human life and social and power relations.[42] This shift means admitting that, for instance, as our engagement with memory changes, the decision to safeguard a monument can also change. If one takes a Confederate statue, to return to the example discussed above, it can mean that the law not only does not forbid – but in fact encourages – changes to the Confederate statue, to alter the narrative around it so as to accommodate changing social values.

Cultural heritage, understood in non-static terms, showcases these tensions and their often difficult negotiation. The way heritage narrates the past is necessarily affected by certain contingencies of the moment when the past is told, as well as the contingencies of when heritage was created in that past and in the present. As such, heritage simultaneously oscillates between negotiating the past in the present and negotiating the present through the past. This understanding qualifies us to understand the historically contingent and embedded nature of heritage, and its role in the production of power, identity and authority in any given society.[43] In other words, "what counts as heritage changes all the time; it is no finished product pickled in amber but an ever-changing palimpsest."[44]

Our relationships to heritage are not based on any version of unique historical truth, even if we often choose or at least attempt to cast heritage as historical truth to stabilise political discourse in favour of certain narratives that we select in order to privilege purportedly universal narratives of humanity. Likewise, heritage is contingent upon shifting memories, particularly in transitioning societies like those engaging with difficult monuments indicated above. Further, overlapping narratives around the same cultural heritage item also suggest that the relevant time of that heritage item is asynchronous, and a single linear narrative enforces the triumph of colonialism. One example in ICHL is the Koh-i-Noor diamond currently adorning the British crown. This large diamond (whose name is Persian for "mountain of light"), once adorned the Mughal-made throne of a Sikh ruler in Punjab (who acquired it after wars in and against the Afghan Empire). It was

[40] G. Spivak, *A Critique of Postcolonial Reason,* Harvard University Press, Cambridge, MA: 1999, pp. 37–38.

[41] V. Vinitzky-Seroussi, *What Can Transitional Justice Take from Social Memory Studies?*, 25(1) Jerusalem Review of Legal Studies 212 (2022).

[42] Hegelsson, *supra* note 37, p. 557.

[43] Harvey, *supra* note 25, p. 321.

[44] D. Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 International Journal of Cultural Property 393 (2005), p. 395.

then removed during the sacking of the palace by the British East India Company, and taken to England as a spoil of war, where it was re-cut and set in a crown. The return of this diamond from the United Kingdom is now simultaneously claimed by India, Pakistan, Afghanistan and Iran, all of whom claim ancestral rights to the jewel.[45] ICHL does not engage with any of this history, simply assuming that the possessor when the relevant international instrument was adopted in the United Nations era is the lawful possessor. Moreover, this example shows us how ICHL tries to order time by projecting national statehood backwards – after all, none of these claimant countries (with the possible exception of Afghanistan) existed as such at the time the diamond was taken to London.

Like the theorisation of time critiques of which I outlined above, international law also for the most part assumes linear and static time and privileges and authorises it. Even if some scholars[46] acknowledge that there are other dimensions of time, for the most part "the conceptual structure of international law would often seem to be presented as essentially atemporal – temporally neutral."[47] Linear, static time better serves a desire for stability in (international) law,[48] and it is therefore those versions of time – with the identities and relationships to memory which they engender – that are best positioned to be captured by international legal processes, and therefore to become authorised time.

Some of these dynamics of capture and authorisation are evident in the operation of international heritage law. At the same time, however, ICHL holds some of the potential for critique and undoing of these same dynamics, given its more immediate aperture to memory and its malleability. The following three sections engage with these binaries, however imperfect binaries are, through how international cultural heritage law engages with the three dimensions of linear time: past, present and future.

2. THE PAST AS NON-JUSTICIABLE FACT

Chrononormative international law encapsulates and isolates the past. It assumes the past to be static and beyond (re-)negotiation. The effect of this assumption is to render the past non-justiciable, for the sake of legal stability and predictability. Chrononormative international law can make the past that informed the making of a legal rule simply

[45] W. Dalrymple, A. Anand, *Koh-i-Noor: The History of the World's Most Infamous Diamond*, Bloomsbury Publishing, London: 2017.

[46] K.P. Van der Ploeg, L. Pasquet, *The Multifaceted Notion of Time in International Law*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 1.

[47] *Ibidem*, p. 6.

[48] Van der Ploeg, *supra* note 1, p. 325.

part of a past that is beyond the reach of the (non-retroactive) rule. This is an approach in which law assumes time, ignoring how law and time co-produce each other.[49]

For international law, it means that for the most part international legal rules do not retroact, international institutions take into account the law at the moment of the juridical fact underlying a dispute (intertemporal law) and international legal obligations enter into force only after the passage of a certain amount of time.[50] While more pragmatic approaches may be available and more desirable to invite us to not automatically discard the past (such as the doctrine of continuing violation in international human rights law, which acknowledges that violations of international law have repercussions extending into the present and future that are in themselves violations of international law),[51] they can be discarded as potentially subjective or arbitrary.[52]

The shortcoming of the more formalistic approach to the past is to discount substantive justice and changes in society that keep international legal commitments relevant (such as changes in the appreciation of Confederate monuments to see them as racist). International human rights law, read anachronistically, can have that effect, even if it can also be charged with using timelessness as a means to stabilise and legitimise legal claims.[53] International human rights law, like other fields of international law, assumes that it operates divorced from contingencies of time to assert its moral authority and legitimacy and to defend itself from attacks based on a negative casting of "politicisation" as an undesirable goal of (certain areas of) international law.[54] This erasure of the past prompted by international law assumes a redeeming narrative of progress. However, as queer thinker Ed Madden has put it, citing Heather Love, "to turn away from the past 'to a present or future affirmation' [...] is to ignore the past as past, the integrity of that history, so that it becomes 'harder to see the persistence of the past in the present,' and the ways that historical injury 'continues to structure [...] experience in the present'."[55]

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[49] E. Grabham, S.M. Beynon-Jones, *Introduction*, in: S.M. Beynon-Jones, E. Grabham (eds.), *Law and Time*, Routledge, Abington: 2019, p. 1.

[50] E. Wyler, A. Whelan, *Lawyers as Creators of Law's Temporal Reality: A Pragmatic Approach to International Law*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, pp. 42–45.

[51] P.A. Ormachea, *Moiwana Village: The Inter-American Court and the Continuing Violation Doctrine*, 19 Harvard Human Rights Journal 283 (2006).

[52] Wyler, Whelan, *supra* note 50, p. 46.

[53] F. Johns, *The Temporal Rivalries of Human Rights*, 23(1) Indiana Journal of Global Legal Studies 39 (2016), p. 44.

[54] *Ibidem*.

[55] Madden, *supra* note 22, p. 139 (citing H. Love, *Feeling Backward: Loss and the Politics of Queer History*, Harvard University Press, Cambridge, Massachusetts: 2007).

Different engagements with the past can be reparative, whether by centring identities and affect,[56] or by focussing on pragmatism to "restore a welcome priority of concrete justice over legal security and nonretroactivity as favoured by formalism."[57] This approach challenges linear time and renders it cyclical instead, in that past, present and future can coexist, and one can go, for instance, from future to past seamlessly and without having to (re)visit the present.[58] In other words, different engagements with the past can be less concerned with the negative effects of reopening those decisions in the past to a stable legal order, and more invested in the need to reopen those decisions as a precondition to a new desirable future. In the ICHL context, it may mean centring what the return of human remains to an Indigenous community means for the rights of Indigenous peoples in future, rather than for the stability of the ownership rights of encyclopaedic museums that hold them in storage facilities where they cannot be accessed by anyone other than museum staff.

In the specific realm of ICHL, it is worth mentioning that from an institutional law perspective, chrononormative international law enshrines a specific view of how to value heritage. The United Nations Educational, Scientific and Cultural Organization (UNESCO), which is responsible for the basic architecture of ICHL, was created only after the Second World War and was deeply informed by the Cold War in its standard-setting action.[59] Since its creation, it has engaged in prolific standard-setting in ICHL. One result of this activity is wider international protection of cultural heritage, which is the product of events that only happened since the second half of the 20th century.[60] This temporal focus means that heritage's role in shaping identity and power in events that preceded the creation of UNESCO is largely ignored, and that those statements about power and authority are taken for granted, as untampered historical narratives.[61]

Another consequence of UNESCO and its standard-setting activity appearing only after the Second World War has to do with the nature of international law, and international treaties in particular. It is a rule of international law that treaties do not retroact, unless they explicitly indicate so.[62] Thus, the new order

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[56] R. Wiegman, *The Times We're In: Queer Feminist Criticism and the Reparative "Turn"*, 15(1) Feminist Theory 4 (2014), p. 4.

[57] Wyler, Whelan, *supra* note 50, p. 449.

[58] *Ibidem*, p. 27.

[59] On the influence of the Cold War in other aspects of international lawmaking in relation to time, *see* V. Kattan, *Self-Determination as Ideology: The Cold War, the End of Empire, and the Making of the UN General Assembly Resolution 1514 (14 December 1960)*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 443.

[60] Harvey, *supra* note 25, p. 325.

[61] *Ibidem*.

[62] *See e.g.* the Vienna Convention on the Law of Treaties: "Article 28. Non-retroactivity of treaties. Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party

of heritage only applies to heritage's existence after a treaty enters into force. As Third World Approaches to International Law (TWAIL) scholars would suggest, doing so reinforces empire by rendering heritage beyond the reach of international legal dispute settlement.[63] The law cannot be a tool to renegotiate the meanings and uses of heritage in the past; it can only really impact the status quo at the moment the law enters into force. That is not to say that the law cannot change that meaning at all, but it must do so using legal categories that are only prospective-looking and that engage with the past in at best rudimentary and secondary ways. Consequently, the past becomes a sacred, pure truth against which heritage is tested, as opposed to being itself a contingent phenomenon. The power relationships of the past become established truths that can certify or deny the value of heritage, instead of being themselves fluid concepts that have often created, recreated and eliminated heritage.

The drafters of the 1970 UNESCO Convention on Cultural Objects initially wanted an instrument that could promote the return of cultural objects to their countries of origin. More specifically, the newly decolonised countries that pushed for and produced the initial draft of this instrument wanted their heritage and cultural artefacts returned. They wanted to use heritage as a means to contest the power relationships that colonialism created and made possible. They also wanted to use claims over heritage to project their collective identities into the past (and, tied to these identities, their statehood). But former colonial powers defeated this proposal at the negotiating table. Thus, the treaty that was ultimately approved is very explicit in that it does not apply to situations that happened before the treaty entered into force.[64] Thus, colonialism and its history are on some level legitimised by the law, which does not allow heritage to be used as a means to contest said history or its power relationships. The law protects and enshrines colonialism through heritage, alongside its identities and power relations.[65] TWAIL engagements with

in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." While this provision does not apply directly to a number of UNESCO treaties (concluded before the entry into force of the Vienna Convention), it applies as a matter of customary international law.

[63] *See generally* A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge: 2005.

[64] *See e.g.* Art. 7, which repeatedly refers to the application of the Convention only to situations that happen "after the entry into force of this Convention."

[65] For additional discussion of this matter, *see* A.F. Vrdoljak, *International Law, Museums, and the Return of Cultural Objects*, Cambridge University Press, Cambridge: 2006.

this state of affairs have uncovered the colonial legacies of ICHL[66] and, more recently, attempted to offer pathways for change via historical analysis.[67]

To counter this now common allegation in the field of ICHL, the Operational Directives to the 1970 Convention, which were not adopted until 2015, state that

> the Convention does not in any way legitimize any illicit transaction of whatever nature which has taken place before the entry into force of this Convention nor limit any right of a State or other person to make a claim under specific procedures or legal remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.[68]

In other words, this document seeks to distance itself from the charge of legitimising the taking of cultural objects during colonialism, while at the same time admitting its impotence to address the issue in any meaningful way. In deferring to other "procedures or legal remedies", it seems to devolve (albeit not entirely) to domestic law, where the relationship to time can arguably be less linear, or at least has been scrutinised more frequently to positive effect.[69] Because international disputes for the return of cultural objects also involve domestic litigation (as a matter of private international law,[70] in particular), domestic law can be an important vector to resist chrononormative international law in such cases.

Effectively, however, the contested ownership of cultural heritage objects becomes unregulated and non-justiciable in international law, and domestic proceedings rely on rules about prescription or state immunity to move claims beyond the reach of the law. Disputes can still be resolved using diplomatic means and ethical protocols, and the existence of international legal commitments – even if inapplicable – often supports restitution, particularly in ethically sympathetic contexts like the return of Nazi-looted artefacts.[71] In the context of returning cultural objects

[66] *See e.g.* B. Goel, *"All Asiatic Vague Immensities": International Law, Colonialism and the Return of Cultural Artefacts,* TWAILR: Reflections No. 41/2022; and S.M. Spitra, *Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century*, 22(2) Journal of the History of International Law 329 (2020).

[67] L. Lixinski, *A Research Agenda for Cultural Heritage Law*, Edward Elgar Publishing, Cheltenham: 2024, pp. 121–147.

[68] Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970), C70/15/3.MSP/11 – Annex (March 2015), para. 102.

[69] T. Soave, *The Politics of Time in Domestic and International Lawmaking*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, pp. 162–164.

[70] For a comprehensive discussion connecting public and private international law, *see* A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford: 2014.

[71] For a summary through the lens of a case study, *see* A. Chechi, *The Gurlitt Hoard: An Appraisal of the Role of International Law with Respect to Nazi-Looted Art*, 23(1) The Italian Yearbook of International Law 199 (2014).

looted by the Nazis or seized by colonial powers, the issue of the arbitrariness or subjectivity of restitution can arise as an argument against return, but these arguments have increasingly fallen to popular pressure for restitution in countries like France, Germany and the Netherlands, to name a few.[72]

More broadly, the example of ICHL shows that international law can have the effect of freezing time in an atemporal existence from which the only way out is forwards, tied to a narrative of progress that assumes synchronicity and its desirability. Lawmakers and legal decision-makers then wrap identities around a Eurocentric model of statehood, politics and overall international legal behaviour which is at the service of nation-states, rather than communities, and which conflates stability and staticity. That this Eurocentric model reinforces certain modes of power and wilfully excludes others seems to have little impact on how we perceive the past. But ICHL also shows that there are pathways, if relatively under-developed ones, to query that past and reopen these conversations. These pathways are grounded on more pragmatic engagements with the law and its temporalities that allow for substantive justice outcomes to be foregrounded at the expense of stability-orientated formal rules. The subjectivity of pragmatic responses to claims for the return of cultural objects, though still an issue, does not trump the growing international consensus in favour of substantive outcomes (like the return of cultural objects taken by Nazis) that international law helps cement.

3. THE PRESENT AS A MIDDLE POINT OF CONTINGENCY

Chrononormative international law, seen in the present, in many ways is the connector between the past and the future. It is the moment in which the lawmaker selects a past and wipes that slate clean (or at least parts of the slate), with a view to not disrupting the present too much and creating a similarly stable (and short-term) future. It is when international law "settles" any disputes over the Koh-i-Noor diamond by validating British possession. This negotiated present is one where a legal regime's contingencies manifest themselves most strongly, through legal imaginaries and political compromises, and are baked into the architecture of said regime. A chrononormative international law focussed on the present, therefore – far from being a moment of technical engagement with temporalities – is one where politics is most alive, and one which ostensibly resolves said politics, while having lasting impacts on the effects and effectiveness of international legal regimes.

[72] For a collection of essays, *see* the articles in 8(2) Santander Art and Culture Law Review (2022). These are described in the introduction by the special issue's editors – E. Campfens, S. Ranganathan, *Colonial Loot and Its Restitution: Current Developments and New Prospects for Law*, 8(2) Santander Art and Culture Law Review 12 (2022), pp. 12–13.

A focus on the present is pervasive across much of international law, as a means of crystallising and leveraging "tipping points", where one can perceive a change that is in fact incremental and largely continuous with the past. A key example in general international law is state succession, where the notion of "instantaneousness" seems to prevail over the gradual pace of change that reflects the reality of the dissolution and reemergence of statehood.[73] Related to state succession but with its own idiosyncrasies, peace agreements – another staple of general international law – show these tensions well, in that they are products of the achievable compromises in the present, while mediating between past and future.[74] The concerns of the present, dressed as change, in fact translate into calls for continuity with the past and a fear of radical ruptures. In doing so, international law ultimately works more conservatively, and the linear treatment of time contributes to the difficulties of the field in addressing the resolution of armed conflicts.[75]

The focus on the present also affects other large fields of international law, with the effect of reinforcing an appearance of stability that leaves broader projects unresolved to ultimately generate instability. One example is international human rights law. The field is often preoccupied with addressing human rights concerns "in real time" so as to be responsive to human rights violations and able to redress it. At the same time, focussing on the present as a single dimension of time allows the field to claim atemporality, which shores up its moral legitimacy. If the field is atemporal, it is not exposed to political contingencies, as the reasoning goes. This move, however, can make international human rights law disconnected from the political realities it is meant to change in the discharge of its emancipatory promise.[76] Whereas the objective of this attachment to the present is to stabilise and enhance the legitimacy of international human rights doctrine, the broader circulation of capital and ensuing circulation of human rights subjects and concerns has rendered this present-based stability untenable.[77]

The concerns with the present not only shore up legitimacy as a tool for effectiveness, as human rights law shows, but also, across all of international law, renders legal regimes viable in the first place. Viability in relation to uses of the present can happen in at least two interrelated ways: firstly, time counted in the present serves

[73] A. Garrido-Muñoz, *Of Relevant Dates and Political Processes: State Succession and the Dissolution of the Former Yugoslavia*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, pp. 278–279.

[74] P. Kastner, *Peace Agreements between Rupture and Continuity: Mediating Time in International Law*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 407.

[75] *Ibidem*.

[76] Johns, *supra* note 53, pp. 39 and 44.

[77] *Ibidem*, p. 57.

as a definitional threshold for a regime to operate, and secondly, the ensuing issue of whether a regime is of interest to potential parties is connected to what they get from the regime (that is, the moment in the present when the state takes the decision to join a regime).

Firstly, in ICHL, the law often defines heritage as necessarily being of a certain age. That threshold can be an actual age requirement, such as 100 years for furniture or certain antiquities under the 1970 Convention,[78] or 100 years underwater for the Underwater Cultural Heritage Convention.[79] Or it can simply mean that many legal definitions of heritage require it to be intergenerational, or to be of importance for future generations of a given group, such as the ICHC's definition of intangible heritage as being "transmitted from generation to generation."[80] The latter definitional threshold is one that requires assessment in the present about whether there has been a past building enough momentum towards the present – specifically because it queries in the present whether culture has been practiced for long enough to be considered "heritage", and once that threshold is met it is the narration of the heritage in the present, with a view to the future, that matters. It shows how our use of culture reaches a tipping point after which it can be considered heritage, but one that is largely continuous with past engagements with those cultural forms.

The processes through which these instruments recognise and authorise heritage seem to create a unidirectional, linear relationship with time, in which heritage is (re)created by the act of international safeguarding. For instance, the World Heritage Convention, the flagship UNESCO instrument in this realm, only speaks of heritage's importance for future generations.[81] At the same time, however, it chooses a narrative in the present about why that heritage is valuable, in the terms set by the territorial state in its presentist social and political configuration, and endorsed by experts under the guise of atemporal neutrality. The contingencies of heritage at the moment the tradition was created seem to be ignored if they happened before the relevant international instrument became applicable (which happens nearly always, given the relative newness of these instruments, which have not been around for more than one or two generations).

Secondly, the time-based definitional threshold of heritage, which the Convention on the Protection of the Underwater Cultural Heritage (UCHC) uses, is also an incentive for regime engagement from the perspective of states parties. Australia is an example of a country that, after initially rejecting the treaty, is now considering ratifying it because WWI wrecks and the corpses they contain have reached the age

[78] Art. 1(k) of the 1970 Convention for furniture and Art. 1(e) for other collections.
[79] Art. 1.1.a UCHC.
[80] Art. 2.1 ICHC.
[81] Art. 4 WHC.

threshold to be protected by the UCHC regime. This legal development, at the behest of civil society representing war veterans, shows how a technical definitional question, often understood as largely separate from political and affective processes on the ground, in fact embodies contingencies that deny the idea of time as linear and progressive.[82]

On 24 August 2018 the Australian Parliament enacted the Underwater Cultural Heritage Act 2018 (Underwater Heritage Act), which came into effect on 1 July 2019, replacing the Historic Shipwrecks Act 1976 (Historic Shipwrecks Act). While it is not in itself a ratification of the UCHC (even if it may lead to it), the Australian government's explanation of the decision to adopt the new legislation states that the new legislation is based partly on "consideration of the requirements arising from the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage."[83] It further states that the Act "is aligned with the UNESCO 2001 Convention, facilitating Australia to be part of the global community's response to illegal salvaging, looting and trafficking of underwater cultural heritage."[84]

Australia's renewed engagement with the UCHC privileges state vessels and what they contain. The legal regime of the UCHC reserves a special position for state vessels in favour of underwater heritage as time capsules of nation-building. In particular, a key concern with respect to these vessels is "to preserve the sanctity of the site and to ensure that any human remains are afforded appropriate treatment", bearing in mind that "these sites will represent the gravesites of those whose lives were lost in the service of their country."[85]

ICHL shows that an attachment to the present, rather than a claim to timeless legitimacy or a means to stabilise contested political objectives and to crystalise them into law, is simply another layer of contingency that clearly projects into the future (and, in some ways, depends on this projection). In doing so, it starkly shows that the present – as an "in-between" dimension of time, ephemerally caught between a past from which it seeks continuity and a future into which it projects the same continuity – can only make sense if leveraged against those dimensions. The present

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[82] For more details, *see* Lixinski, *supra* note 21.

[83] *Underwater Cultural Heritage Act 2018*, Australian Government, Department of Environment and Energy, 10 March 2002, available at: https://www.environment.gov.au/heritage/underwater-heritage/underwater-cultural-heritage-act (accessed 30 June 2025).

[84] *Ibidem*. *See also* the Second Reading Speech, which is key to understanding the purpose of legislation in Australia and an important interpretive tool under Australian Law. The speech discusses as a key policy motivation for the Act "Australia's consideration of ratification of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage." Underwater Cultural Heritage Bill 2018 – Second Reading (House of Representatives on 28 March 2018, Senate on 27 June 2018), available at: https://tinyurl.com/4pczbh6r (accessed 30 June 2025).

[85] S. Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge University Press, Cambridge: 2013, p. 134.

becomes devoid of autonomous possibilities, which undermines the possibility of action in international law for the sake of stability between past and future. The present still operates as a static snapshot of the past with which it is continuous, and international legal processes project that continuity into the future in trying to increase their legitimacy, at the cost of emancipatory possibilities. This configuration of the present calls the usefulness of linear time into question, as present shifts and timelessness proves unachievable.

4. THE FUTURE AS A NON-COMMITTAL COMMITMENT

Given the law's role of shaping social relations, it should be unsurprising that chrononormative international law would aim at the future. However, this commitment seems for the most part to be assumed (much like the law's general relationship with time), rather than explicit: "[i]t is for the future that law is made."[86] One effect of this assumption is to normalise chrononormative linearity and narratives of progress; another is to render future identities static. Both those factors neutralise or at least pre-empt certain forms of political engagement with international legal regimes. A chrononormative international law focussed on the future, in other words, stabilises identities in favour of unidirectional linearity towards a future whose apolitical character is assumed or desired. In aiming for an absence of politics, it foregrounds certain political commitments and attempts to eliminate others, and these unselected political projects continue to be sources of instability enabled, and in some ways necessitated, by a chrononormative future that commits to a project by default.

International law often falls short of addressing change as being brought about by the future because it misunderstands how individuals experience change personally and in their identity-forming social interactions.[87] This "inaccurate sense of how time passes" creates fictions which assume that legal doctrines and their interpretations are true at frozen moments in time and for perpetuity.[88] In other words, international law often assumes that identity is static and that the need for stability and predictability trumps changes in individuals' and peoples' engagement with international law. As identities and social, cultural and political commitments change, so inevitably does their commitment to international legal regimes, and therefore the entrenchment of these very regimes. In other words, if these regimes are static, they will invariably lose relevance and their drive to stabilise social rela-

[86] G. Messenger, *The Development of International Law, Perception, and the Problem of Time*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 351.

[87] *Ibidem*, p. 333.

[88] *Ibidem*, p. 336.

tions will be always temporary. In rejecting changes to identity, chrononormative international law focussed on the future thus falls short of its promise of stability, and in fact generates instability.

The dissonance, or asynchrony, between international legal sources that claim to be stable and timeless, and the pace of change in international affairs (and the world at large), underpins the problem of change in international law.[89] Conceptual work in other fields of international law uses the idea of social acceleration to describe similar effects. Social acceleration also challenges this notion of a stable chrononormative international law focussed on the future by showing that the confluence of capital, technological change and the contemporary nation-state does not fit a linear, predictable imaginary. In international environmental law,[90] for instance, social acceleration shows that linearity is incongruous and an obstacle to the development of resilience.[91]

ICHL too assumes a static future, bound to its linear connection to the past. With the exception of the ICHC, discussed above, ICHL sees heritage as immutable. The 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations[92] engages with the way the present relates to the future in ways that are relevant for our purposes, given its source. This Declaration reaffirms the importance of international human rights instruments in understanding the rights of future generations,[93] as well as the key role of environmental instruments.[94] Both environmental law and ICHL share this idea of choosing a present to imagine

[89] Van der Ploeg, *supra* note 1, p. 328.

[90] J. Ellis, *Change and Adaptation in International Environmental Law: The Challenge of Resilience*, in: K.P. Van der Ploeg, L. Pasquet, L. Castellanos-Jankiewicz (eds.), *International Law and Time*, Springer, Cham: 2022, p. 360.

[91] *Ibidem*, p. 375.

[92] Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997.

[93] Preamble: "Considering the provisions of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted on 16 December 1966, and the Convention on the Rights of the Child, adopted on 20 November 1989, [... and] Stressing that full respect for human rights and ideals of democracy constitute an essential basis for the protection of the needs and interests of future generations." *See also* Art. 2: "Freedom of choice. It is important to make every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity."

[94] Preamble: "Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments such as the Convention for the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO on 16 November 1972, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992, the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development on 14 June 1992, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, and the United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990."

a future.[95] The World Heritage Convention is one of these environmental instruments, and the only heritage treaty explicitly mentioned in the Declaration (which was adopted before the ICHC).

The Declaration focusses on the relationship between the present and the future, without mentioning the role of the past. While that choice is understandable, it also sits uneasily with heritage, and it assumes a chrononormative stability that largely erases the past, in line with what I argued above. And the erasure of the past allows for the future to be assumed. For instance, the one provision in the Declaration that makes explicit reference to the role of heritage is restricted to urging recognition of the responsibility for identifying and safeguarding heritage, taking for granted that heritage will play a positive role for future generations and not engaging with its role in shaping the present through its past.[96] Therefore, in an instrument that tackles temporalities head-on, UNESCO steers away from engaging with the past and focusses instead on the present and future. But, in doing so, it also ignores the contingencies that determine the present,[97] and consequently the future.

ICHL does not anticipate the idea of loss of heritage, either, despite its productive potential.[98] Instead, it largely criminalises and punishes change (which it frames alternately as destruction,[99] damage[100] or loss).[101] Change is irreconcilable with the safeguarding function of ICHL, and in fact heritage that changes too much can lose the protection of ICHL. Those responses tend to frame heritage safeguarding as all or nothing – change is negative, and to be avoided. This position gets in the way of the adaptability of identity and disconnects those changes from the law that is meant to safeguard identities. In this regard, the example of change brought about by non-human action is illustrative of the shortcomings of seeing change to heritage as an irreconcilable event. ICHL is less responsive to climate

[95] In an environmental and feminist context, *see* B. Goldblatt, S. Hassim, *"Grass in the Cracks": Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle*, in: C. Albertyn, M. Campbell, H. Alvair Grarcia, S. Fredman, M. Machado (eds.), *Feminist Frontiers in Climate Justice: Gender Equality, Climate Change and Rights*, Edward Elgar Publishing, Cheltenham: 2023, p. 260.

[96] Art. 7: "Cultural diversity and cultural heritage. With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations."

[97] For a collection of essays on contingency in international law, *see* I. Venzke, K.J. Heller (eds.), *Contingency in International Law: On the Possibility of Different Legal Histories*, Oxford University Press, Oxford: 2021.

[98] C. DeSilvey, R. Harrison, *Anticipating Loss: Rethinking Endangerment in Heritage Futures*, 26(1) International Journal of Heritage Studies 1 (2020), pp. 3–4.

[99] F. Lenzerini, *Intentional Destruction of Cultural Heritage*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 75.

[100] E. Novic, *Remedies*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 642.

[101] DeSilvey, Harrison, *supra* note 98.

change resulting directly from social acceleration and to the needs of mitigation. It engages little with other change-focussed frameworks such as disaster response law, as well.[102] Once individuals' and groups' relationships with identity and the heritage that embodies it are understood to be more malleable and subject to change, as the ICHC suggests, then the fable of chrononormative stability and its ensuing erasure of the malleability of identity can be challenged.

Elsewhere in international law, transitional justice frameworks, which align with the example of peace treaties in the previous subsection,[103] can also help challenge static futures. They showcase, as with climate change, that individuals' and peoples' relationships with the world around them are meant to shape a future, but also change in response to that future. Legal frameworks that attempt to capture those relationships and the identities that underpin them are bound to fail and become irrelevant if they do not accommodate for the possibility of those changes at a more granular level of identity. Doctrines such as fundamental change of circumstances in the general secondary rules of international law do not foreground identity-based relationships in the same way, nor do they allow for regimes to adapt; rather, they simply preclude wrongfulness and therefore exclude the regime's application. ICHL shows us that resilient international legal regimes need to resist the chrononormative impulse towards (a version of) stability and to better deal with change from the perspective of the identities of those whom international law seeks to help.

5. RESISTING CHRONOMORMATIVE INTERNATIONAL LAW

The three linear dimensions of time (past, present and future) fail even as a heuristic, in that there are too many spillovers to warrant a characterisation of time that assumes these three dimensions as separate categories. The chrononormative assumptions and effects of this linear and static understanding of time, as ICHL shows, do not function. ICHL does attempt to adhere to and enforce static and linear time, however, much like it attempts to enforce and authorise static identities. It does so in the name of a perceived need for stability. As the previous sections show, though, normative or factual instability is often the result of these normative commitments. Minority identities can be oppressed in the name of national identity projects, colonial restitution claims can get suspended or unresolved and ICHL can fail to engage productively with change and adaptation that keeps heritage alive and relevant for communities. Examples from other fields of international law – such as human rights, forced migration, environmental law and the law of

[102] G. Bartolini, *Cultural Heritage and Disasters*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 145.

[103] Kastner, *supra* note 74.

treaties – showcase how these tensions in ICHL resonate throughout international law more broadly.

Examining chrononormative international law underscores how in fact time is not linear, as the artificiality of the heuristic confirms. If chrononormative stability cannot be achieved, then we are better off embracing anti-synchronous, radical time to pursue justice. This anti-synchronous time is non-linear; it defaults to pragmatism as a proxy for substantive justice.[104] It presents "a circular, rather than sequential, view of time", based on a constant back-and-forth between law and reality.[105] It makes room for non-European epistemologies coming from queer, feminist and anti-colonial critiques of Eurocentrism, also helping entrench international norms at the local level.

The risk with this approach is that, in seeking to have law that is not in force trump law that is in force but is ineffective,[106] one can engender new forms of violence through (international) law, as international lawyers deploying queer theory teach us.[107] At times, as the 1970 Convention I discussed above shows in the context of colonial restitution, even the formality of hard-fought but ultimately less effective international treaties can be important to certain historically disadvantaged states, and these laws can still influence ethical outcomes that might not be captured by legal analysis.

Further, to the extent that pragmatism relies on the meaning given to a norm by a relevant community to ensure clarity,[108] the pressures of international legal structures that, allied with capitalism, have brought us to chrononormative international law may be too strong in providing those open-ended meanings. We might need a new imaginary that does away with the fiction of synchronicity and stability, where chrononormative international law is turned upside down and becomes anti-synchronicity. Pragmatic engagements may still be helpful,[109] as long as they do not default to old structures as the more present meaning for temporal querying.

In that respect, anti-synchronous time rejects chrononormative stability. While seemingly unstable at first, anti-synchronous time promotes better engagement with identity and rejects notions of linear progress that European international legal projects are centred on. It pluralises international lawmaking and rejects the discarding of the epistemologies of the Other. It can in fact produce better out-

[104] Wyler, Whelan, *supra* note 50, p. 27.

[105] *Ibidem*, p. 41.

[106] *Ibidem*.

[107] For a critique of the violence of international law, *see generally* V. Hamzić, *International Law as Violence: Competing Absences of the Other*, in: D. Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, Routledge, New York: 2018, p. 77.

[108] Wyler, Whelan, *supra* note 50, p. 45.

[109] *Ibidem*, p. 49.

comes for international lawmaking and can stabilise the legitimacy of international law, not as a tool for the perpetuation of power and racism or other forms of identity-based yet structural power imbalances, but as the terrain where one can find common ground for human experience that is not violent or colonial, that does not lock historically disadvantaged groups and states into passive victimhood and vulnerability. It can move us away from the linearity of "development-time" and its capitalist expansionist trappings.[110] Agency can be recentred because it is no longer measured against a static Eurocentric ideal. ICHL shows us how the porousness of time can be leveraged to understand and productively engage the malleability of time and identity. Despite its shortcomings, ICHL has much to teach international law more generally.

CONCLUDING REMARKS

Chrononormative international law uses static, linear time to regulate human activity towards stability. In doing so, however, it often engenders instability, as international cultural heritage law shows. The heuristics of linear time, alongside their constitutive effects, do not withstand closer scrutiny. ICHL, because of its predisposition to focus on identity, is an optimal battleground to highlight the incongruities of chrononormative international law, and to start exploring alternative, anti-synchronous ways of understanding international law's relationship with time. A thicker engagement with time via identity and a richer understanding of contingencies allow us to nurture the emancipatory potential of international law beyond the universalistic (read: Eurocentric) assumptions of how law and time interact. ICHL in particular offers us a window to perceive and untangle these challenges because of its close affinity to identity. We learn through ICHL that it is possible to embrace the changeability of international law's regulatory objects, and that in effect this change is necessary if international law is to serve peoples, rather than states as abstract entities and imperfect proxies for peoples.

The insights from ICHL also echo elsewhere in international law. International law's predisposition towards stability exists elsewhere, as the examples I discussed in this article show. The desire for stability is one that best serves a state-centric and Eurocentric international legal order. By refocussing international law's mission on the rights and emancipation of people, the role of memory – alongside its contingency, malleability and non-linearity – becomes more apparent, and international law's tendency to render memory and identity static can be problematised as more than an exception to an otherwise functioning legal order. Malleability can

[110] Goldblatt, Hassim, *supra* note 95, p. 266.

become the rule, rather than the exception, and can make anti-synchronocity the new baseline. Other modes of seeing, capturing and experiencing time can come to the foreground when they do not have to operate as carveouts to static linearity. We open ourselves to engage more pragmatically with substantive justice outcomes in a way that serves concrete populations, rather than abstract states and abstract expectations of unidimensional stability and order. Once upon a time, we made international law to service a static status quo. But our happily ever after depends on a radical reconfiguration of that relationship.

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DIVISIVE *JUS COGENS* RELOADED: SOME REMARKS ON THE PEREMPTORY CHARACTER OF SELF-DETERMINATION UNDER THE ICJ ADVISORY OPINION OF 19 JULY 2024

Abstract: *The article focusses on a specific aspect of the International Court of Justice's (ICJ) 2024 Advisory Opinion on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, namely the statement that the right to self-determination constitutes a peremptory norm of international law. The article submits that the finding of the ICJ can be at variance with the basic criteria set forth by the International Law Commission in the 2022 Conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens). In particular, limiting the peremptory effect of self-determination to cases of foreign occupation that lead to annexation risks undermining the unitary, universal character of peremptory rules. Overall, the case confirms the divisive potential of the concept of jus cogens in the international legal community.*

Keywords: peremptory rules, International Court of Justice, self-determination, codification of international law

INTRODUCTION

One can comfortably say that, more than 50 years after its formulation in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT), the notion of *jus cogens* has made its way in the international legal order. As a matter of fact, the concept is increasingly quoted and its legal implications widely recognised in an impressive number of judicial decisions, at both the international and domestic levels.[1]

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[1] On international case law, *see e.g.* ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and admissibility, 3 February 2006, ICJ Rep 2006, p. 32, para. 64; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Rep 2012, p. 457, para. 99. On case law at the domestic level, *see* Tribunale di

At the same time, the concept has become smart money at the United Nations, particularly in the context of the codification works of the UN International Law Commission (ILC) and of the General Assembly (GA) Sixth (legal) Committee.[2] Nonetheless, it is not unusual to find in the current legal literature statements to the effect that the concept of *jus cogens* "continues to be controversial to this day".[3] In this vein, the divisive potential of the notion in international law is still under scrutiny.[4] A short paragraph of the Advisory Opinion rendered by the International Court of Justice (ICJ or the Court) on 19 July 2024, "Legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory",[5] which affirms the peremptory character of the right to self-determination, also suggests that the very basic issue of the material scope of *jus cogens* is far from settled. The purpose of this short paper is to consider why it is so. To this end, a preliminary overview of the theoretical background underlying the identification of peremptory rules and the status of self-determination is provided (Section 1). Then, the treatment of the issue of self-determination in the 2024 Advisory Opinion and in the previous case law of the Court is considered (Section 2). Finally, some remarks on the implications of the peremptory character of self-determination as presented in the 2024 Advisory Opinion are put forward (Section 3).

Trapani, *Vos Thalassa*, sentenza 3 giugno 2019 (in Italian), available at: https://www.questionegiustizia.it/data/doc/2613/sentenza-vos-thalassa-gip-trapani-3-giugno-2019.pdf (accessed 30 June 2025), which stands out as one of the few instances of judicial application of Art. 53 VCLT.

[2] *Cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001)*, Yearbook of the International Law Commission 2001, vol. 2, part 2, arts. 40–41, pp. 112–116; UNGA, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, 13 April 2006, A/CN.4/L.682; GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), p. 11 ff.

[3] *See* W. Czapliński, *Is There a Space for* Jus Cogens *in Present International Law? Remarks in the Context of a Ban on the Use of Force*, 11(2) Polish Review of International and European Law 149 (2022). A classic confutation of the notion of peremptory norms is in G. Schwarzenberger, *International Jus Cogens?*, 43(4) Texas Law Review 455 (1965); more recently, *see also* M. Glennon, *De l'absurdité du droit impératif (jus cogens)*, 110(3) Revue Générale de Droit International Public 529 (2006).

[4] *See* M. Arcari, B. Bonafé, *Divisive Jus Cogens*, in: K. Kowalik-Bańczyk, K. Wierczyńska, A. Jakubowski (eds.), *Euphony, Harmony and Dissonance in the International Legal Order*, ILS PAS, Warszawa: 2024, p. 43. For a comprehensive assessment of the legal literature on the topic, *see generally* R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*, Hart Publishing, Oxford–Portland: 2015, pp. 15–29 and 30–44.

[5] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, ICJ Rep 2024.

1. THEORETICAL BACKGROUND: THE IDENTIFICATION OF PEREMPTORY NORMS AND THE STATUS OF SELF-DETERMINATION IN THE ILC DRAFT CONCLUSIONS ON *JUS COGENS*

The most recent stocktaking on *jus cogens* was provided by the ILC with the adoption on second reading, in 2022, of a set of "Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)" (Conclusions).[6] The ILC Conclusions are basically conceived to serve as methodological tool, namely to provide guidance to those who may be called upon to determine the existence of peremptory norms of general international law and their legal consequences. As stated in the relevant ILC commentary, the Conclusions "are concerned primarily with the method of establishing whether a norm of general international law has the added quality of having a peremptory character" and "are thus not concerned with the determination of the content of peremptory norms themselves."[7] This methodological purpose explains why the Conclusions are framed as guidelines, intended to describe the basic function and nature of *jus cogens* and to provide relevant criteria for identifying when a norm has peremptory character. For example, Conclusion 2 describes the nature of peremptory norms by stating that they "reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law."[8] Conclusion 4 sets forth the criteria for the identification of a peremptory norm, and states that it must be established that "(a) it is a norm of general international law" and "(b) it is accepted and recognized by the international community of States as whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[9] Conclusion 6 further elaborates on the requirement of "acceptance and recognition", by pointing out that when referred to peremptory norms, this criterion "is distinct from acceptance and recognition as a norm of general international law." This means that in order to conclude that a certain rule is endowed with *jus cogens* character, "there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as

[6] For the text of the draft Conclusions and the commentaries thereto, *see* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), pp. 11–89.

[7] *Ibidem*, p. 17, para. 4, Conclusion 1 ("Scope").

[8] *Ibidem*, p. 18, Conclusion 2 ("Nature of peremptory norms of general international law (*jus cogens*)").

[9] *Ibidem*, p. 29, Conclusion 4 ("Criteria for the identification of a peremptory norm of general international law (*jus cogens*)").

a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character."[10] Very importantly, Conclusion 7 clarifies the meaning of the expression "international community of States as a whole", by explaining that "acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required."[11] The other Conclusions deal with the legal consequences of peremptory norms. Some of these draw from and elaborate on the rules embodied in Arts. 53 and 64 of the VCLT, by providing for the invalidity or termination of treaties conflicting with peremptory rules of international law.[12] Other conclusions deal with international responsibility arising from the breach of peremptory norms, by establishing the obligation for all states to not recognise as lawful the situation created by the breach and to not render aid or assistance in the maintenance of such situation.[13]

The consistency of the methodological approach adopted by the ILC appears to be called into question by Conclusion 23, which tentatively addresses the substantive content of *jus cogens*. The annex to Conclusion 23 provides a "Non-exhaustive list" of eight norms asserted to possess peremptory status, ranging from "(a) the prohibition of aggression" to "(h) the right of self-determination."[14] In the commentary on Conclusion 23, the ILC insists on the point that the identification of specific norms having a peremptory status would fall beyond the scope of the Conclusions, and underscores that the purpose of the non-exhaustive list is merely "to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms." Rather paradoxically, the ILC emphasised that, in drafting this non-exhaustive list, "it did not apply the methodology it set forth in the Conclusions for identifying peremptory norms."[15]

The ILC decided to maintain the non-exhaustive list notwithstanding the criticisms expressed by many states in their comments to the first reading of the Conclusions, and their suggestion to drop the list. According to these states, the

[10] *Ibidem*, p. 36, respectively paras 1 and 2 of Conclusion 6 ("Acceptance and Recognition").

[11] *Ibidem*, p. 37, para. 2 of Conclusion 7 ("International community of States as a whole").

[12] *Ibidem*, p. 48, Conclusion 10 ("Treaties conflicting with a peremptory norm of general international law (*jus cogens*)").

[13] *Ibidem*, p. 70, Conclusion 19 ("Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)").

[14] *Ibidem*, pp. 85 and 89, Conclusion 23 ("Non exhaustive list") and Annex. Other listed examples of *jus cogens* norms include "(b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture".

[15] *Ibidem*, p. 85, paras. 1–3 of the commentary to Conclusion 23.

non-exhaustive list is of dubious utility,[16] "rather simplistic, [...] unclear and undefined",[17] with "no added value",[18] "unconvincing and contradictory",[19] as well as "inconsistent with the recognized standard for determining the existence of a *jus cogens* norm".[20] It is worth adding that some states also expressed doubts as to the very content of the non-exhaustive list. Israel and the United States, for example, specifically contested the peremptory character of the right to self-determination.[21]

With this background in mind, we can now consider the contribution to the issue offered by the ICJ's 2024 Advisory Opinion.

2. SELF-DETERMINATION IN THE ICJ CASE LAW AND ITS SIGNIFICANCE IN THE 2024 ADVISORY OPINION

In its Advisory Opinion of 19 July 2024, the Court held that Israel's continued presence in the Occupied Palestinian Territory (OPT) is unlawful.[22] The Court came to this conclusion on the grounds that the legal status of Israel's occupation of the OPT entails a series of policies and practices which violate different international rules, among which the prohibition of the use of force[23] and the principle of self-determination of peoples are paramount.[24] Especially the latter principle was expressly mentioned in the GA request for the Advisory Opinion, which asked the Court to determine the legal consequences arising "from the ongoing violation by Israel of the right of the Palestinian people to self-determination."[25] It is to be noted that the Court had already considered the issue, while in a more limited context, in its 2004 Opinion, "Legal consequences of the construction of a wall in the Occupied

[16] See UNGA, *Peremptory Norms of General International Law (jus cogens): Comments and Observations Received from Governments*, 9 March 2022, A/CN.4/748, p. 99 (the comment of Australia).

[17] *Ibidem*, p. 101 (the comment by the Czech Republic).

[18] *Ibidem*, p. 106 (the comment by the Netherlands).

[19] *Ibidem* (the comment by the Russian Federation).

[20] *Ibidem*, p. 113 (the comment by the United States).

[21] *Ibidem*, p. 104 (Israel) and p. 113 (United States).

[22] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Rep 2024, para. 285(3).This conclusion was reached by eleven votes to four (Vice-President Sebutinde, Judges Tomka, Abraham and Aurescu).

[23] The impact of the prohibition on the use of force in the context of the Advisory Opinion is not considered herein; on this issue, *see* M. Arcari, *Un'occupazione, un'annessione, una norma imperativa. Note sul parere della Corte internazionale di giustizia del 19 luglio 2024*, 18(3) Diritti Umani e Diritto Internazionale 633 (2024), pp. 636–641.

[24] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Rep 2024, especially paras 174–179, concerning the prohibition of the acquisition of territory by force, and paras 230–243, concerning the question of self-determination.

[25] *See* UNGA resolution of 30 December 2022, *Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories*, Doc. A/RES/77/247, para. 18(a).

Palestinian Territory", in which it found that it constituted a breach of the right of the Palestinian people to self-determination.[26] Thus, the conclusion reached in the most recent ruling is not surprising, as long as the Court maintains that the prolonged nature of Israel's unlawful policies and practices amounts to an aggravation of the aforementioned violation. The main novelty of the 2024 Advisory Opinion is then to be found in a short sentence contained in its paragraph 233, which will presumably acquire the status of a precedent in the ICJ's case law. In that paragraph "[t]he Court considers that, *in cases of foreign occupation such as the present case*, the right to self-determination constitutes a peremptory norm of international law."[27]

The statement is of utmost significance, especially if compared to the Court's previous case law on the subject, where the ICJ recognised the fundamental character of self-determination by qualifying it as "one of the essential principles of international law"[28] and underscoring that the "respect for the right to self-determination is an obligation *erga omnes*."[29] At the same time, however, in its previous case law, the Court had refrained from explicitly affirming the peremptory character of self-determination. The reasons for the Court's recent leap forward are not elaborated in the context of the 2024 Advisory Opinion, and are only addressed in some of the Judges' individual opinions or declarations attached thereto.[30]

One could be tempted to suggest that paragraph 233 intends to finalise the process of consolidating the peremptory character of the right to self-determination, which was in some respect prompted and anticipated by the ILC through its inclusion of self-determination in the non-exhaustive list of peremptory norms annexed to the 2022 Conclusions. This point is made by Judge Tladi, who at the very outset of his fairly elaborated Declaration laments the Court's "historical reluctance" to pronounce itself clearly on the peremptory status of norms.[31] In order to overcome the ambivalence of the Court on the question, Judge Tladi endeavours to wipe

[26] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 184, para. 122: "That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."

[27] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, para. 233 (emphasis added).

[28] ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 102, para. 29.

[29] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Rep 2019, p. 139, para. 180; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 199, para. 155.

[30] *See* Declaration of Judge Xue, paras 2–5, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-06-en.pdf; Separate Opinion of Judge Gómez Robledo, paras 18–28, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-encs.pdf; Declaration of Judge Tladi, paras 14–35, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-14-en.pdf (all accessed 30 June 2025).

[31] *See* Declaration of Judge Tladi, *supra* note 30, para. 16.

out uncertainties over the peremptory status of self-determination. To this end, he specifically refers to the fact that it has been supported by "a very large majority of States" participating in the *Chagos* and current proceedings; that "not a single State" opposed the peremptoriness of self-determination in 2001 during the final elaboration of the ILC Articles on State Responsibility; and that in 2022, out of a total of 86 states commenting on the ILC Draft Conclusions on *jus cogens*, only five – namely Israel, the United States, Estonia, the United Kingdom and Morocco – questioned the peremptory status of self-determination.[32] The conclusion on the issue is that "the recent objections from only five States, [sic] cannot have the effect of casting doubt on what has, for a long time, been seen as an eminently uncontroversial proposition."[33]

This reasoning is purportedly intended to situate the question "in the context of the criteria for the identification of peremptory norms" as set forth in the ILC 2022 Conclusions.[34] In this perspective, ILC Conclusion 7 is likely to assume a critical impact, insofar as it maintains that for a norm to have a peremptory character the acceptance and recognition of the totality of states are not required, but it needs the support of a "very large" and "representative" majority.[35] According to the ILC commentary,

> [d]etermining whether there was a very large majority of States accepting and recognizing the peremptory status of a norm was not, however, a mechanical exercise in which the number of States is to be counted. Rather than a purely quantitative assessment in which a majority was determined, the assessment had to be *qualitative*. [...] The idea that what is required is a qualitative assessment is also captured by the word "representative" to qualify "majority of States". The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures.[36]

Admitting that this yardstick is retained, the data provided by Judge Tladi concerning the rejection "by only five States" of the peremptoriness of self-determination may perhaps meet the *quantitative* requirement of acceptance and recognition by a very large majority of states. However, if one considers who the five recalcitrant States are, reservations can be made about whether the *qualitative* requirement of

[32] *Ibidem*, para. 25.

[33] *Ibidem*, para. 26.

[34] *Ibidem*, para. 24.

[35] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), para. 2 of Conclusion 7 ("International community of States as a whole").

[36] *See ibidem*, p. 40, paras 7–8 of the ILC commentary to Conclusion 7 (emphasis added).

acceptance and recognition by a representative majority of states is fully respected in the case at hand. In other words, the fact that the above-mentioned objections are coming from an important sector of the international community, together with the circumstance that several states involved in the ICJ proceedings have supported a very flexible view of the right to self-determination (see *infra*), might cast doubt on the conclusion that the requirements laid down by the ILC for establishing the peremptory nature of a norm are fully met.

Given such difficulties, it could be hard to read in paragraph 233 of the 2024 Advisory Opinion a general and definitive restatement of the peremptory character of self-determination in all cases. This does not exclude, however, that the *obiter dictum* under review would respond to a more limited purpose. It can be suggested that the Court wished to reply to a peculiar argument raised in the context of the advisory proceedings. Some states had claimed that the right to self-determination of the Palestinian people would have had in the specific circumstances of the case a "relative" character: that is to say, such a right would have had to be counterbalanced with Israel's security needs and, in any event, it had to be implemented in the context of a process of negotiation between the parties involved.[37] It is at this stage that the role of the main legal instruments produced in the context of that negotiation, namely the so-called Oslo Agreements concluded between Israel and the Palestinian side between 1993 and 1995, came to the forefront.[38] These instruments were mentioned in part IV of the 2024 Advisory Opinion, dealing with applicable law; the final paragraph of that section concluded with the statement "the Court will take the Oslo Accords into account as appropriate."[39] In the subsequent parts

[37] *Cf.* ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for an Advisory Opinion). Memorial of Fiji*, Written statement of Fiji, 25 July 2023, p. 8, ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-37-00-en.pdf: "Self-determination is a relative right, [sic] that must be respected with other rights, including the rights of the Jewish people to self-determination and to security. This is why a solution to the conflict must be found through a political process." For similar remarks, *see also* ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United States of America, 25 July 2023, p. 4, paras 1.6 ff., ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-20-00-en.pdf; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United Kingdom of Great Britain and Northern Ireland, 20 July 2023, p. 2, para. 4 and p. 34, paras 69 ff., ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-15-00-en.pdf (all accessed 30 June 2025).

[38] The text of the so-called Oslo Accords is reproduced in UNSC, *Letter dated 8 April 1993 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council*, 11 October 1993, S/25560 and UNGA, *Letter dated 27 December 1995 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General*, 5 May 1997, A/51/357.

[39] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, para. 102.

of the Advisory Opinion, the Oslo Accords are cited to emphasize that "Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation",[40] and again to conclude that "these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs."[41]

Although they are not explicitly mentioned, it can be assumed that the Court had the Oslo Accords in mind in the paragraph where it elaborated on the impact that violating the Palestinian people's right to self-determination had on the legality of the Israeli presence in the OPT. Noting that "occupation cannot be used in such a way as to leave indefinitely the occupied population in a state of suspension and uncertainty", the Court considered "that the existence of the Palestinian people's right to self-determination cannot be subject to conditions on the part of the occupying power, in view of its character as an inalienable right."[42]

It is difficult not to link this *inalienable* character of the right to self-determination to the previous assertion regarding its *peremptory* nature. Hence, one wonders what effects the combination of the two statements may have on the Oslo Accords. It can comfortably be excluded that the Court intended to hold that the Oslo Accords were contrary to the right to self-determination of Palestinian people and to draw the extreme consequence under Art. 53 VCLT, namely, the invalidity of the Accords.[43] A more plausible explanation would be to assume that the Court was instead inclined to make a moderate call to the need to interpret and apply the Oslo Accords in a manner consistent with the peremptory character to be reserved for the right to self-determination in the specific situation of the OPT. Noteworthily, such a conclusion would also be most in keeping with Conclusion 20 of the ILC draft on *jus cogens*, according to which "[w]here it appears that there may be a conflict between a peremptory norm of general international law (jus cogens) and another rule of international law, the latter has, as far as possible, to be interpreted and applied so as to be consistent with the former."[44]

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[40] *Ibidem*, para. 140.

[41] *Ibidem*, para. 263.

[42] *Ibidem*, para. 257.

[43] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), p. 48, Conclusion 10 ("Treaties conflicting with a peremptory norm of general international law (*jus cogens*)").

[44] *See ibidem*, p. 79, Conclusion 20 ("Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)"). Such a reading of the Court reasoning is upheld in the Declaration of Judge Tladi, *supra* note 30, para. 35.

3. PEREMPTORY NORMS "À LA CARTE"?

Finally, the statement contained in paragraph 233 of the 2024 Advisory Opinion may be interpreted to mean that, in an extreme case of prolonged foreign occupation, self-determination indicates a goal (i.e. the establishment of an independent state), the realisation of which cannot be delayed, hindered or made subject to conditions. This relevance of the ICJ's ruling has been endorsed by GA Resolution ES-10/24 of 18 September 2024, devoted to the follow-up of the 2024 Advisory Opinion. In its preamble the resolution unequivocally states that "[t]he Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations, a right that constitutes a peremptory norm of international law in such a situation of foreign occupation, and that Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign state, over the entirety of the Occupied Palestinian Territory".[45]

On the other hand, it is also true that, precisely because in paragraph 233 of the 2024 Advisory Opinion the peremptory effect is circumscribed to the very specific situation of foreign occupation leading to annexation, the *obiter dictum* of the Court runs the risk of envisaging a right to self-determination "à la carte". In other words, one may wonder whether, after the statement made in paragraph 233 of the 2024 Advisory Opinion, there is room for identifying a variable degree of peremptoriness for the right to self-determination.

One may note that, after all, such an outcome will not be so far from the one envisaged by the ILC itself with regard to the prohibition of the use of force. In fact, according to the non-exhaustive list annexed to the ILC Conclusions, only the "prohibition of aggression" is indicated as a candidate norm to be endowed with peremptory character.[46] This seems to suggest that less extreme forms of the use of force, not amounting to an act of aggression, would not fall under the purview of a *jus cogens* prohibition.[47] It can be added that, in the comments to the draft Conclusions, one of the very few states favourable to retaining the non-exhaustive

[45] *See* UNGA resolution of 18 September 2024, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, Doc. A/RES/ES-10/24 the seventh paragraph of the preamble, letter (f).

[46] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), pp. 85 and 89, Conclusion 23 ("Non exhaustive list") and Annex.

[47] For an overview of the scholarship's debate on this issue, *see* A. de Hoogh, *Jus Cogens and the Use of Armed Force*, in: M. Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford University Press, Oxford: 2015, pp. 1161–1186.

list has underscored that the ILC's choice would unduly restrict the scope of the *jus cogens* norm prohibiting the use of force.[48]

A likely effect could be replicated for self-determination if one follows the perspective presented in paragraph 233 of the 2024 Advisory Opinion. Take for example the case of a people subject to a local government practicing a policy of systematic racial discrimination or apartheid, i.e. one not "representing the whole people belonging to the territory without distinction as to race, creed or colour".[49] If one follows the terms of the GA Declaration of Principles on Friendly Relations, in such a situation the right to self-determination would be deemed to apply. At the same time, under the proviso of paragraph 233 of the 2024 Advisory Opinion, insofar as the relevant context is not identifiable with an extreme case of foreign occupation leading to annexation, the right to self-determination would not be considered peremptory. Would it then follow that the exercise of the right to self-determination of the people unduly discriminated against and oppressed can be legitimately delayed or subject to conditions? Or – in a different vein – that the secondary consequences typically connected to the breach of *jus cogens* rules (i.e. the obligation of all states to not recognise as legal the situation created by the racist government and to not render aid and assistance in maintaining that situation)[50] would not apply? A shortcut for avoiding such a paradoxical outcome is provided in the Declaration of Judge Tladi, who suggested that the narrow reading delivered in paragraph 233 was without prejudice to the peremptory status of other elements of the right to self-determination that may become relevant in situations other than the one at stake in the 2024 Advisory Opinion.[51] It is clear that, in terms of legal certainty, to make the scope of a *jus cogens* rule dependent on the circumstances of each individual case would be a rather unpredictable solution.[52] To say the least, this would

[48] *See* UNGA, *Peremptory Norms of General International Law (jus cogens): Comments and Observations Received from Governments*, 9 March 2022, A/CN.4/748, p. 100, the comment of Austria.

[49] *See* UNGA resolution of 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, A/RES/2625(XXV), Annex.

[50] *See* Art. 41 of the ILC Articles on State Responsibility, as well as Conclusion 19 of the ILC Conclusions on *jus cogens*, *supra* note 13.

[51] *Cf.* Declaration of Judge Tladi, *supra* note 30, para. 14: "This qualifier 'in cases of foreign occupation such as the present case' is rather unclear, but I understand it to mean that the element of the right of self-determination impeded by the ongoing foreign occupation by Israel, is assuredly a peremptory norm of international law. This statement would be without prejudice to the peremptory status of other elements of the right of self-determination (which were not at issue in the present case). In the same way, stating that the (narrower) prohibition of aggression is a peremptory norm does not necessarily mean that the broader prohibition on the use of force is itself not peremptory."

[52] *Cf.* the Declaration of Judge Xue, *supra* note 30, para. 5: "I am of the opinion that the peremptory character of the right of self-determination of the Palestinian people rests on [a] solid basis of international law, rather than the special circumstances of Israel's occupation."

be at variance with the qualities of universality and hierarchical superiority that the ILC itself has indicated among the basic characteristics of peremptory norms.[53]

CONCLUDING REMARKS

In a recent essay published in the *liber amicorum* for Professor Władysław Czapliński, my co-author and I proposed a tentative investigation into the divisive potential of *jus cogens* in international law. Following the analysis, we argued that the notion of *jus cogens* is currently largely accepted by states and international law scholars of different traditions, and concluded that "the notion of *jus cogens* is today much less divisive that in the past."[54] Admittedly, that research was mainly focussed on certain "structural" characteristics of *jus cogens* and deliberately omitted the question of identifying the material content of peremptory rules. The review carried out in the current paper suggests that not only may the conceptualisation of *jus cogens* prove controversial, but the issue of establishing its material scope is also far from settled. In particular, the interpretation of paragraph 233 of the ICJ's Advisory Opinion of 19 July 2024, which affirms the peremptory character of self-determination while at the same time suggesting a narrow reading of its scope, seems destined to bolster the old debates about the divisive scope of *jus cogens* within the international legal community.

[53] *Cf.* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), Conclusion 2.

[54] *See* Arcari, Bonafé, *supra* note 4, p. 54.

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VALIDITY OF A POTENTIAL PEACE TREATY BETWEEN UKRAINE AND THE RUSSIAN FEDERATION IN THE LIGHT OF ARTICLE 52 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

Abstract: *This article examines the legal validity of a potential peace treaty between Ukraine and Russia under Art. 52 of the Vienna Convention on the Law of Treaties (VCLT), which renders treaties invalid if procured by the threat or use of force. It analyses the key elements of Art. 52, the relevant case law and state practice and the legal consequences for other states in case such a treaty is voided.*

Keywords: coercion, Vienna Convention on Law of the Treaties, peace treaty, Ukraine, VCLT

INTRODUCTION

Recent diplomatic developments, particularly following the high-level meeting in Riyadh, have indicated a notable shift in both American and Russian officials' rhetoric regarding the possibility of ending the conflict in Ukraine.[1] The specific terms and parties of any potential peace treaty regarding the situation in Ukraine are still unclear. However, there are strong indications that a peace settlement would likelyinvolve significant territorial concessions on the part of Ukraine.[2] While considerable

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[1] *Secretary of State Marco Rubio's Remarks to the Press*, US Department of State, 10 March 2025, available at: https://www.state.gov/secretary-of-state-marco-rubio-remarks-to-the-press-2/ (accessed 30 June 2025).

[2] P. Kehl, *Treaty or No Treaty? – International Law and the Purported Trump Peace Proposal for Ukraine*, EJIL: Talk!, 2 December 2024, available at: https://www.ejiltalk.org/treaty-or-no-treaty-international-law-and-the-purported-trump-peace-proposal-for-ukraine/; G. Fox, *A Legal Framework for a Russia-Ukraine Peace Agreement*, EJIL: Talk!, 19 December 2024, available at: https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/ (both accessed 30 June 2025).

international discussion has centred on the political and strategic dimensions of whether Ukraine should be willing or compelled to make territorial concessions,[3] insufficient attention has been devoted to examining the fundamental question of whether such an international agreement would be valid under international law.

This article examines the potential legal impediments that such a prospective peace treaty would face, in the light of Art. 52 of the Vienna Convention on the Law of Treaties (VCLT or the Convention).[4] The core focus is on the Convention's explicit provision rendering treaties invalid if they have been procured by the threat or use of force in violation of principles enshrined in the United Nations Charter (UN Charter). This critical legal framework raises fundamental questions about the validity of any peace agreement negotiated in the context of ongoing military operations, especially one that includes concessions to the detriment of the victim of aggression. It may also have significant implications for the future legal status and obligations of Ukraine, the Russian Federation and other states of the international community.

1. APPLICABLE LAW

Both Russia and Ukraine are parties to the VCLT, which was also acknowledged by the International Court of Justice (ICJ) in its recent judgment, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*.[5] It follows that a possible future written agreement between Ukraine and Russia concerning a peace settlement would satisfy the Convention's definition of an international treaty. The legal framework of the VCLT would therefore provide the primary mechanism for evaluating the validity and legal effect of any such agreement. The key provision analysed here is Art. 52 VCLT, according to which a "treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

Art. 52 VCLT protects a state's free will as a cornerstone of free consent[6] and provides a fundamental safeguard against the coerced formation of international agree-

[3] O. Goncharova, *Ukraine Must Make Concessions in Any Peace Deal, Rubio Says*, The Kyiv Independent, 10 March 2025, available at: https://kyivindependent.com/ukraine-must-make-concessions-in-any-peace-deal-rubio-says/ (accessed 30 June 2025).

[4] Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[5] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024, ICJ Rep 2024, para. 46.

[6] *See also* Preamble of the Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

ments through use of force or the threat of force against a state. The provision aims to protect the sovereign equality of states by ensuring that international agreements reflect their genuine consent rather than submission to coercion. Art. 52 VCLT is closely linked with the general customary rule prohibiting the use of force, and thus also with Art. 2(4) UN Charter, and it serves to reinforce the latter since the inevitable consequence of any treaty which the victim state is coerced into by the threat or use of force is for it to be null and void.[7]

The rule which invalidates an agreement concluded under the threat or use of force has the character of customary international law, as also confirmed by the ICJ in the *Icelandic Fisheries* case.[8] Accordingly, the invalidity rule codified in Art. 52 VCLT extends to all states and their international agreements, including those that are not parties to the Convention or members of the United Nations.

2. PROCURED BY THE THREAT OR USE OF FORCE IN VIOLATION OF THE PRINCIPLES OF INTERNATIONAL LAW

Considering the current political climate, the key question is whether Ukraine can validly accept unfavourable terms in a peace treaty, most notably terms that would require any territorial concessions. To put it differently, is it legally permissible under international law for Ukraine to unilaterally agree to territorial concessions in exchange for peace? The core legal questions regarding the implications of Art. 52 VCLT are therefore whether a potential peace treaty between Ukraine and Russia could be deemed as having been "procured through the threat or use of force" and what the consequences are if the answer to this question is affirmative.

2.1. Use of unlawful force

Art. 52 VCLT itself does not define the term "force". Although there were conflicting views among states during the drafting of the Convention regarding whether Art. 52 should also encompass economic coercion,[9] it can be stated with little doubt that the term "force" is used in connection with the general prohibition on the use of force as stipulated in Art. 2(4) of the UN Charter. At the same time, from the

[7] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, pp. 649–650.

[8] ICJ, *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), Judgment, 2 February 1973, ICJ Rep 1973, p. 3, para. 24 – the ICJ held that "[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void."

[9] O. Corten, P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, Oxford: 2011, pp. 1205–1206. *See generally* M. Lipovský, *Suitability of the Principle of Non-intervention as a Rule against Cybernetic Electorate Targeting Information Operation*s, unpublished manuscript (on file with the author).

wording of Art. 52 VCLT, specifically from the wording "in violation of the principles of international law", it can be concluded that only treaties resulting from the *unlawful* use of force are subject to invalidity.[10]

It follows that treaties concluded under coercion involving the *lawful* use of force, such as use of force in self-defence under Art. 51 of the UN Charter or according to Security Council resolutions under Chapter VII (Art. 42 of the UN Charter) do not fall under the scope of invalidity. In other words, if the coercion in question is a result of the lawful use of force, under which an aggressor is compelled to conclude an unfavourable international treaty, such a treaty is not rendered invalid under Art. 52 VCLT.[11]

It is well known that on 24 February 2022, the Russian Federation launched a full-scale military attack on Ukraine. The invasion was another escalation of the conflict between the two countries which began in 2014. Russia's full-scale invasion of Ukraine included the deployment of ground forces into Ukrainian territory and air and naval attacks on Ukraine.[12] These acts undoubtedly have constituted the "use of force" within the meaning of Art. 2(4) of the UN Charter. Russian officials have provided several justifications for their invasion of Ukraine. Initially, they claimed that Russia did not feel secure due to a perceived threat from Ukraine linked with concerns over the expansion of NATO. They explicitly referred to their actions as a "pre-emptive strike". Later, Russia also offered other reasons, including the need to protect Russian-speaking populations in Ukraine and allegations of "genocide" in Donbas or alleged biological weapons development programmes in Ukrainian territory.[13] All of these assertions point to the fact that Russia attempts to justify its invasion of Ukraine by claiming to exercise the right to self-defence. However, all these assertions were either unsubstantiated or referred to a distant, vague threat rather than an actual or imminent threat of armed attack.[14]

It can therefore be concluded that the first element of Art. 52 VCLT is met, because the Russian invasion constitutes an "unlawful use of force". This conclusion is further supported by the UN General Assembly, which in its resolution of 2 March 2022 deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter."[15]

[10] K. Schmalenbach, *Article 52*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Berlin: 2018, p. 949.

[11] *Ibidem*, p. 950.

[12] *See* section edited by K.E. Eichensehr, *Contemporary Practice of the United States Relating to International Law*, 116(3) American Journal of International Law 593 (2022), pp. 593–652.

[13] T. Hoffmann, *War or Peace? – International Legal Issues Concerning the Use of Force in the Russia–Ukraine Conflict*, 63(3) Hungarian Journal of Legal Studies 206 (2022).

[14] *Ibidem*. *See generally* C. Gray, *International Law and the Use of Force*, 3rd ed., Oxford University Press, New York: 2008, pp. 114–167.

[15] UNGA resolution of 18 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1.

2.2. Legal consequences of invalidating a treaty according to Art. 52 VCLT

It is important to note that the effect of invalidating a treaty under Art. 52 VCLT is inevitable, since it is an automatic legal consequence of any treaty if its conclusion has been procured by the threat or use of force, and such treaty is void *ab initio*.[16] Thus, unlike the grounds for invalidity set out in Arts. 48 to 50 VCLT (i.e. error, fraud or corruption of a state representative), for example, in the case of Art. 52 there is no need for a party to the contract to invoke such invalidity. Art. 52 provides absolute voidness,[17] which occurs automatically and *ex tunc*.[18]

Art. 52 VCLT can be understood not only as safeguarding the free will/consent of states, but also as a broader mechanism reinforcing the system of collective security built after the World War II (WWII) era. By preventing the recognition or "legalisation" of territorial acquisitions achieved through the unlawful use of force, Art. 52 may serve as a tool for strengthening the international order and discouraging attempts for territorial acquisition through aggression.[19] In this context, it also appears appropriate to note that, in light of the wording of Art. 44(5) VCLT,[20] a treaty rendered invalid under Art. 52 is null and void in its entirety. As a result, it is not possible to extract or salvage any provisions that would produce legal effects.[21]

Such an interpretation of Art. 52 VCLT would lead to the conclusion that any peace treaty concluded by Ukraine under coercion and containing territorial concessions in favour of Russia would be automatically void *ab initio*.[22] The effect of Art. 44(5) VCLT, which precludes the separation of a treaty's provisions, would also mean that even those parts of the potential agreement that would be beneficial for Ukraine would be invalid.

2.3. Consequences for possible territorial concessions

Taking into account the recent political development, it can be expected that a proposed peace agreement between Ukraine and Russia would likely include territorial concessions on the part of Ukraine, which could concern the lands of Crimea, Donetsk, Luhansk, Kherson or Zaporozhe.[23] However, if the legal title for territo-

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[16] Schmalenbach, *supra* note 10, pp. 954–955.

[17] Corten, Klein, *supra* note 9, p. 1214.

[18] Schmalenbach, *supra* note 10, pp. 954–955.

[19] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford: 2012, pp. 387–395.

[20] Art. 44(5) VCLT provides that "[i]n cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted."

[21] *Ibidem*.

[22] M. Vishchyk, J. Pizzi, *Compromise on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine*, Just Security, 6 October 2023, available at: https://tinyurl.com/mrxspbec (accessed 30 June 2025).

[23] Fox, *supra* note 2; Kehl, *supra* note 2.

rial gains of the Russian Federation was to be a treaty concluded with Ukraine in connection with coercion (in the form of the unlawful use of force), such a treaty would be without legal effect. In such a case, the Russian Federation would lack a valid legal title to acquire the territories concerned.[24] Moreover, the absence of a valid legal title would apply not only to any territorial transfers resulting from coercion, but also to the continued military and civilian presence of the Russian Federation in the affected Ukrainian regions.

That would lead to several legal consequences. Firstly, the presence of Russian civilian and military personnel would continue to qualify as an unlawful use of force.[25] In this regard, it can be convincingly argued that in future, ongoing unlawful occupation of Ukrainian territories by the Russian Federation would constitute a continuing armed attack within the meaning of Art. 51 of the UN Charter. Consequently, Ukraine would remain entitled to exercise its right to self-defence.[26] Secondly, the possible future annexation of Ukrainian territories would lack any legal title, and the continuing unlawful use of force by Russian forces would still qualify as a violation of peremptory norm,[27] thus causing serious legal consequences for the international community. The consequence of that would be an obligation on the rest of the states to not recognise the effects of any possible Russian annexation of Ukrainian territories.

The duty to not recognise such an unlawful situation is provided in Art. 41(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which states: "[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."[28] In other words, states have a duty to refrain from certain actions, which includes two key obligations. Firstly, they are obliged to not recognise as lawful any situation resulting from serious breaches as defined

[24] M. Vischyk, J. Pizzi, *The Voices from Kyiv: Is the World legal Order in Decay?*, Just Security, 26 February 2025, available at: https://www.justsecurity.org/108358/kyiv-world-legal-order-decay-2/ (accessed 30 June 2025).

[25] ICJ, *Military and Paramilitary Activities in and against Nicaragua Nicaragua v. United States of America*, Judgment, 27 June 1986, ICJ Rep 1986, paras. 188–190; UNGA resolution of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Doc. A/RES/2625(XXV), p. 122.

[26] D. Akande, A. Tzanakopoulos, *Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?*, EJIL: Talk!, 18 November 2020, available at: https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/ (accessed 30 June 2025).

[27] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Rep 1986, para. 190; ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, Yearbook of the International Law Commission, 2022, vol. 2, part 2, Annex.

[28] ILC, *Responsibility of States for Internationally Wrongful Acts with Commentary*, Yearbook of the International Law Commission, 2001, vol. 2, part 2.

in Art. 40 ARSIWA. Secondly, states must not provide any aid or support in sustaining such a situation.[29] The rule is also embodied in the UN General Assembly Declaration on Friendly Relations and Co-operation Among States, where it is directly connected with the prohibition to recognise as legal any territorial acquisition resulting from the threat or use of force.[30] The rule regarding the obligation of non-recognition reflects the so-called Stimson Doctrine from the time of the Manchurian Crisis of 1931–1932[31] and it is to be considered a customary norm of international law, binding on all states.[32]

The ICJ has addressed the duty of non-recognition in several significant advisory opinions. First, in the *Namibia* Advisory Opinion (1971),[33] where the ICJ analysed the legal consequences of South Africa's continued presence in Namibia despite UN Security Council Resolution 276 (1970). The ICJ held that the United Nations member states were obligated to acknowledge the illegality of South Africa's presence in Namibia. Furthermore, states were required to refrain from any actions that might suggest their recognition of the legality of South Africa's presence or to provide support or assistance to its administration.[34] From the reasoning of the advisory opinion, it appears that in *Namibia* the ICJ not only identified the obligation of other states to refrain from recognising the unlawful situation as lawful, but also articulated a positive duty for states to acknowledge the illegality of South Africa's actions. On the other hand, in this opinion, the ICJ considered only a situation where South Africa would not adhere to a binding Security Council resolution, and the existence of such resolution played a significant role for the ICJ's conclusion on the legal consequences for other UN member states.[35]

The ICJ further addressed the obligation of non-recognition in the *Wall* Advisory Opinion (2004), where the court examined the legal consequences arising from Israel's construction of a wall in the Occupied Palestinian Territory. The Court took the position that all states are under the obligation to not recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian

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[29] *Ibidem*.

[30] UNGA resolution of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Doc. A/RES/2625(XXV), p. 123: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

[31] ILC, *Responsibility of States for Internationally Wrongful Acts with Commentary*, p. 114 quoting Henry Stimson, *Secretary of State's Note to the Chinese and Japanese Governments*, fn 653.

[32] *Ibidem*.

[33] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971.

[34] *Ibidem*, para. 119.

[35] *Ibidem*, paras 115–19; *see further* Vischyk, Pizzi, *supra* note 22. *See* A.E. Evans, *Judicial Decisions*, 66(1) The American Journal of International Law 145 (1972).

Territory, including in and around East Jerusalem, and to not provide aid or assistance in maintaining the situation.[36] Such an interpretation is a bit narrower than the one presented by the ICJ in the *Namibia* Advisory Opinion, since it does not include a positive obligation for states to acknowledge the illegality of the situation. However, it still identifies a duty for states to refrain from recognising the unlawful situation as legal.[37]

Recently, the ICJ also addressed the issue in its Advisory Opinion, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem.*[38] The Court observed that the obligations violated by Israel included certain *erga omnes* obligations. More importantly for our purposes, one such obligation, according to the Court, arose from the prohibition against acquiring territory through the use of force.[39] In light of this, the Court asserted that "all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory."[40] Moreover, The ICJ went even further than in its previous *Wall* Advisory Opinion, stating that all states are also under a duty to refrain from entering into treaty relations with Israel in any cases where Israel would intend to act on behalf of the Occupied Palestinian Territory.[41]

To summarise, the conclusion of a peace treaty between Ukraine and Russia – invalid according to Art. 52 VCLT – would also have serious legal consequences for third states. Notably, other states would be obliged to refrain from recognising as legal the possible territorial gains of Russia[42] or any presence of Russian forces in Ukrainian territory. In the light of the ICJ opinion, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, *Including East Jerusalem*, such a duty would also include an obligation to abstain from entering into treaty relations with Russia in any case where Russia would intend to act on behalf of the occupied Ukrainian territory, including economic relations. That could become particularly relevant in the context of international trade concerned with natural resources originating in the Ukrainian-occupied territories.

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[36] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004. *See generally* M. Lipovský, *Assessing the Legal Boundaries of Military Support to Ukraine from the Perspective of Use of Force*, 50(1–2) Review of Central and East European Law 87 (2025).

[37] *See generally* C. Gray, *The ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 63(3) Cambridge Law Journal 527 (2004), p. 532.

[38] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, ICJ Rep 2024.

[39] *Ibidem*, paras. 278–79.

[40] *Ibidem*, para. 279.

[41] *Ibidem*, para. 278.

[42] *See also* Kehl, *supra* note 2.

2.4. Procured by unlawful use force

According to the wording of Art. 52 VCLT, a treaty is only invalid if it has been *procured* by the (unlawful) use of force. That wording indicates that the mere objective existence of an unlawful use of force against a party to a treaty – in this case, Ukraine – is not, in itself, sufficient to render such treaty invalid according to Art. 52 VCLT. Rather, for this to occur, it is necessary to establish a causal link between the unlawful use of force and the conclusion of the treaty.[43]

The key question in this context is what degree of proximity must exist between the unlawful use of force and the conclusion of the treaty. The relevant legal doctrine does not provide a clear, unequivocal answer to this question. Different interpretations exist regarding the degree of the required proximity. For example, the ILC Commission rapporteur Hersch Lauterpacht was of the opinion that "a treaty is invalid if a State, as the result of unlawful use of force, has been reduced to such a degree of impotence as to be unable to resist the pressure to become a party to a treaty."[44] Sir Lauterpacht's approach resonated in the decision of the Dutch District Court of the Hague, which in 1955 reviewed the validity of the Treaty on Questions of Nationality and Option concluded between Czechoslovakia and Germany in 1938. In this context, the Dutch Court gave the following reasoning: "The German-Czechoslovak Nationality Treaty was invalid because it was concluded under clear and unlawful duress – the effect of which Czechoslovakia could not escape – exercised by Germany."[45] The above-quoted examples support a rather high threshold for establishing the causal link, which could be met only in cases where the victim state concluded the treaty because it was deprived of its free will as a result of the unlawful use of force.[46]

However, the object of Art. 52 VCLT is broader than the "mere" protection of a state's free will. The provision also prevents the coercing state from benefiting from the unlawful use of force.[47] This interpretation is supported by the reasoning that Art. 52 serves as a preventive mechanism against the legalisation of territorial acquisitions achieved through aggression.[48] According to the broader approach to the causal link, the invalidity of a treaty could be established if it can be demonstrated that the victim state would not have entered into the treaty had it not been subjected to coercion, whether through the actual use of force or the threat of

[43] Corten, Klein, *supra* note 9, p. 1211.

[44] H. Lauterpacht, *Report on the Law of Treaties*, Yearbook of the International Law Commission, 1953, vol. 2, p. 149.

[45] District Court of the Hague, *Amato Narodni Podnik v. Julius Keilwerth Musikinstrumentefabrik* (1955) 24 ILR 435, 437 in Schmalenbach, *supra* note 10, p. 948.

[46] Corten, Klein, *supra* note 9, p. 1212.

[47] Schmalenbach, *supra* note 10, p. 947.

[48] Crawford, *supra* note 19.

force. Under this approach, the focus is on whether the victim state's decision to conclude the treaty was significantly influenced by the coercive circumstances rather than requiring absolute proof of a direct causal mechanism or absolute absence of freedom of choice.[49]

3. RELEVANT JUDICIAL PRACTICE AFTER THE SECOND WORLD WAR

Judicial practice does not provide many examples of international judicial or arbitral decisions that have directly or exhaustively addressed the issue of causality in the context of assessing an international treaty's validity. In this regard, reference can be made to the decision of the arbitral tribunal in the case of *Aminoil v. Kuwait,*[50] in which the arbitral tribunal addressed Aminoil's argument that its consent to a relevant agreement was vitiated since it had been given under coercion.[51] In this regard, the tribunal stated: "it is necessary to stress that it is not just pressure of any kind that will suffice to bring about a nullification. There must be a constraint invested with particular characteristics, which the legal systems of all countries have been at pains to define in terms either of the absence of any other possible course than that to which the consent was given or of the illegal nature of the object in view, or of the means employed."[52] Eventually, the tribunal dismissed the company's argument because, according to it, the respective pressure "was not of a kind to inhibit its freedom of choice." The reasoning in the decision aligns more closely with a narrower approach which emphasises the need to prove that the affected party was deprived of genuine free choice. In this view, coercion is not established merely by the presence of pressure or unfavourable circumstances, but requires a demonstration that the party had no reasonable alternative but to comply. It is true that this decision was issued in a dispute between a non-state entity and a state which is not a signatory to the VCLT. Moreover, the coercion alleged by Aminoil was economic in nature rather than involving the use of force in the sense contemplated by Art. 52 VCLT. However, the case was decided primarily according to the rules of international law,[53] and it is thus noteworthy.

A similarly restrictive approach can also be observed in the case concerning the dispute over land and maritime boundary between the Emirate of Dubai and the

[49] Corten, Klein, *supra* note 9, p. 1213.

[50] *The American Independent Oil Company v. The Government of the State of Kuwait*, Ad Hoc Arbitration, Final Award, 24 March 1982. For details of the case *see* G. Manston, *The Aminoil–Kuwait Arbitration*, 17(2) Journal of World Trade 177 (1983).

[51] *The American Independent Oil Company v. The Government of the State of Kuwait*, paras. 40–41.

[52] *Ibidem*, para. 43 (emphasis added).

[53] Corten, Klein, *supra* note 9, fn 91.

Emirate of Sharjah, in which the arbitration tribunal held that "mere influences and pressures cannot be equated with the concept of coercion as it is understood in international law."[54]

The ICJ also addressed Art. 52 VCLT in *Fisheries Jurisdiction (UK v. Iceland)*, where the Court examined Iceland's argument that the so-called *Exchange of Notes*, which embodied the relevant agreement, had taken place under "extremely difficult circumstances". Iceland claimed that these circumstances involved the use of force by the British Royal Navy, which was deployed to oppose the 12-mile fishery limit established by the Icelandic Government in 1958.[55] The ICJ addressed Iceland's claim by stating that the statement may be interpreted as a vague charge of duress, rendering the Exchange of Notes invalid *ab initio*.[56] In this context, the ICJ only briefly observed, "as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void."[57] Unfortunately, the ICJ did not further elaborate on this statement, as it held that the court cannot consider an accusation of such a serious nature based solely on a vague and general claim that is not supported by any evidence.[58]

Judge Fitzmaurice also took a rather sceptical stance in his separate opinion on the possibility of duress. He emphasised the fact that Iceland actually obtained the most benefits from the *Exchange of Notes* in question, despite raising the claim of coercion. This approach, which assesses coercion based on the substantive content of the agreement rather than solely on the circumstances of its conclusion, appears to be quite restrictive.[59] The ICJ's relatively high standard of proof regarding the alleged coercion was criticised by dissenting Judge Padilla Nervo. In particular, he disagreed with the Court's insistence on the need for documentary evidence specifying the "*kind, shape, and manner* of the force" that had been used. He further argued that a great power can exert force and pressure on a smaller nation in many ways, even through diplomatic insistence on having its position recognised and accepted. Judge Paddila Nervo pointed out that the Royal Navy did not need to

[54] Court of Arbitration, *Dubai-Sharjah Border Arbitration* (1981) 91 ILR 543, p. 571. For details of the case, *see* S. Fietta, R. Cleverly, *Dubai-Sharjah Border Arbitration (Award of the ad hoc Court of Arbitration, 19 October 1981)*, in: S. Fietta, R. Cleverly (eds.), *A Practitioner's Guide to Maritime Boundary Delimitation*, Oxford University Press, Oxford: 2016, pp. 210–220; D.W. Bowett, *The Dubai/Sharjah Boundary Arbitration of 1981*, 65(1) British Yearbook of International Law 103 (1994).

[55] ICJ, *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), para. 24.

[56] *Ibidem*.

[57] *Ibidem*.

[58] *Ibidem*.

[59] *Ibidem*, Separate opinion of Judge Fitzmaurice, para. 19.

resort to the actual use of armed force: its mere presence within the fishery limits of the coastal state could itself constitute sufficient pressure.[60]

Another example of invoking Art. 52 VCLT was when the League of Arab States argued before the ICJ[61] the invalidity of the Oslo Accords. Despite the League of Arab States's quite strong assertation that the Oslo Accords' "procurement in the context of the occupation constitutes a manifest and egregious form of coercion",[62] the ICJ did not address the argument.

Similarly, Nicaragua invoked the rule embodied in Art. 52 VCLT before the ICJ in its territorial and maritime dispute with Colombia.[63] The ICJ dismissed Nicaragua's claim on the basis that Nicaragua had treated the respective treaty as valid for more than 50 years and had never contested its validity before.[64] This ICJ approach was subject to certain criticism expressed by dissenting Judge Bennouna, who had favoured a deeper investigation into Nicaragua's claim.[65]

Considering that under the VCLT, a treaty procured by the use of force is void *ab initio* without further conditions (see below), some of the ICJ's above-mentioned arguments are not convincing. In this context, the fact that the *victim state* did not contest the invalidity of such a treaty for a certain period should not be relevant to the respective legal assessment. What should be relevant is whether there was an unlawful use of force and whether the treaty was concluded as a consequence of such use (or threat) of force. However, the prevailing judicial practice suggests a tendency among international courts (tribunals) to avoid directly addressing this issue.

4. PEACE TREATIES AND TERRITORIAL CONCESSIONS AFTER SECOND WORLD WAR

Regarding examples of peace treaties concluded after WWII (and since the UN Charter was adopted) that did not directly concern the settlement with the Axis powers, a detailed analysis provided by Rasmussen reveals that it would be exceptional to conclude a peace treaty that would provide for a direct title to *de jure* territorial

[60] *Ibidem*, Dissenting opinion of Judge Paddila Nervo, pp. 47–48.

[61] League of Arab States, *Written Comments of the League of Arab States, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion)*, 25 October 2023.

[62] *Ibidem*, para. 31.

[63] ICJ, *Case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia*), Memorial of Nicaragua, 28 April 2003, paras. 2.122–2.138.

[64] ICJ, *Case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia),* Judgment, 13 December 2007, ICJ Rep 2007, p. 832, para. 79.

[65] *Ibidem*, Dissenting opinion of Judge Bennouna, pp. 925–26. *See also* K. Rasmussen, *Lawful Ends to Unlawful Wars: The Prohibition on Coerced Treaties and the Fate of Ukraine*, 135 Yale Law Journal 1 (2025), pp. 36–37.

exchanges between states.[66] The sharp decline in the number of treaties ending international armed conflict is also remarkable in contrast to the sharp increase in the number of agreements ending non-international armed conflict. Professor Fox, in his extensive research on peace treaties, notes only seven final agreements since 1990 concerning international armed conflict, as opposed to 63 final agreements for ending armed conflict of a non-international character.[67] These circumstances may have moderated states' practice of invoking the rule set out in Art. 52 VCLT. This is further reinforced by the fact that if a treaty is concluded as a result of force which has been qualified as lawful, Art. 52 VCLT is again irrelevant. This is applicable, for example, to the Dayton peace agreement,[68] which was concluded after NATO's military involvement aiming to end the siege of Sarajevo.[69] However, due to authorisation from the Security Council acting under Chapter VII, that use of force was predominantly seen as lawful. Thus, Art. 52 VCLT does not play any role in the Dayton peace agreement.[70] However, there are two inter-state international treaties that are worthy of closer scrutiny. The first one – the Kumanovo Military Technical Agreement (Kumanovo Agreement) – was concluded during the Kosovo crisis in 1999.[71] The second one – the Lusaka Ceasefire Agreement[72] – emerged during a peace process with the Democratic Republic of Congo and was also signed in 1999. Both of these agreements and the circumstances surrounding their creation are analysed in detail below.

4.1. Kumanovo Agreement

The Kumanovo Agreement was signed on 9 June 1999, in response to the Kosovo crisis, and NATO's military intervention against the Federal Republic of Yugoslavia (FRY) in particular, which occurred between 24 March 1999 and the signing of the Kumanovo Agreement. The treaty was concluded between the FRY and the International Security Force (KFOR). The FRY took the obligation of immediately ceasing hostilities in Kosovo and agreed to a gradual, phased withdrawal of all FRY

[66] Rasmussen, *supra* note 65. Rasmussen identified 23 peace treaties involving de jure transfers of territory. However, 12 of them did so because of the results of boundary commissions; five treaties concerned the post-WWII settlement with the Axis states; and the four remaining treaties involved newly independent states.

[67] G.H. Fox, *Old and New Peace Agreements*, 52(3) Seton Hall Law Review 797 (2022); Fox, *supra* note 2.

[68] Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina (signed on 23 November 1995).

[69] M.O. Beale, *The Role of Airpower in Bosnia-Herzegovina*, Air University Press, Alabama: 1997.

[70] E. Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status*, 14 European Journal of International Law 999 (2003), p. 1017; *see also* the authors mentioned in fn 81 therein.

[71] Military Technical Agreement between the International Security Assistance Force and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia (signed on 9 June 1999).

[72] Lusaka Ceasefire Agreement (signed on 10 July 1999), as submitted to the Security Council by the parties to the Lusaka Agreement.

forces from that region, relocating them to Serbia outside of Kosovo, as part of the broader effort to restore stability and enable the deployment of international peacekeeping forces.[73] Moreover, the FRY accepted that the KFOR would be deployed to and operate in Kosovo following the adoption of the anticipated future UN Security Council Resolution. This effectively granted the FRY's consent for the presence of international forces in Kosovo.[74] The Security Council Resolution, as was anticipated in the Kumanovo Agreement, was officially adopted by the Security Council the very next day, on 10 June 1999, and it was Resolution 1244 (1999) which established the international administration of Kosovo and endorsed the Kumanovo Agreement.[75]

Since the FRY accepted the Kumanovo Agreement following NATO military intervention on its territory, some may argue that the FRY's consent was a result of coercion, which may raise questions over the agreement's legal validity under Art. 52 VCLT.[76] These doubts are supported by the very wording of the agreement: Art. II.2(1) states that "[o]nce it is verified that FRY forces have complied with this subparagraph and with paragraph 1 of this Article, NATO air strikes will be suspended. The suspension will continue provided that the obligations of this agreement are fully complied with, and provided that the UN Security Council (UNSC) adopts a resolution concerning the deployment of the international security force." This clause strongly suggests a direct conditional link between the cessation of NATO's military action and the FRY's acceptance of and compliance with the terms of the Kumanovo Agreement.[77] These doubts may be further reinforced by the fact that, prior to NATO's military intervention, the FRY had refused to sign the Rambouillet Agreement, which was proposed by NATO.[78] It is true that the proposed Rambouillet Agreement was not identical to the later Kumanovo Agreement. However, there were certain similarities, including the obligation for the FRY to withdraw its forces from Kosovo and international forces (KFOR) to be deployed there.[79] In addition, statements made by representatives of the FRY suggest that its consent to the Kumanovo Agreement was given under coercion due

[73] Military Technical Agreement between the International Security Assistance Force and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia (signed on 9 June 1999), Art. II(1)–(2).

[74] *Ibidem*, Art. I(1)–(2) and Appendix B.

[75] Resolution 1244 (1999), 10 June 1999, S/RES/1244(1999), *see also* Annex II of the SC Resolution 1244 (1999).

[76] Milano, *supra* note 71; I. Janev, *The Possibilities for Termination of the Kumanovo Agreement*, 5(2) Journal of Political Science and International Relations 58 (1999).

[77] Milano, *supra* note 71, p. 1008 and fn 46, which refers to the statement of 6 June 1999 made by NATO spokesman James Shea.

[78] Interim Agreement for Peace and Self-Government in Kosovo (signed on 18 March 1999).

[79] *Ibidem*.

to NATO's bombing campaign.[80] Given that NATO's military action in the FRY was not authorised by a UNSC resolution under Chapter VII of the UN Charter and does not fall under the scope of the right to self-defence as outlined in Art. 51, NATO's use of force may be reasonably qualified as a violation of international law.[81] Thus, it can be reasonably argued that the Kumanovo Agreement met the conditions outlined in Art. 52 of the VCLT, as it was concluded under circumstances that may rather strongly indicate coercion. However, despite these concerns, the agreement was subsequently endorsed by the UNSC through Resolution 1244 (1999).

4.2. Lusaka Ceasefire Agreement

Another example illustrating the practice of states and the approach of UN bodies is the Lusaka Ceasefire Agreement. This agreement, signed on 10 July 1999, pursued the aim of ending the Congo war and involved multiple African states and armed groups (the Democratic Republic of the Congo (DRC), Uganda, Angola, Namibia, Rwanda and Zimbabwe). The Lusaka Agreement covered several issues key to ending the war, including the cessation of hostilities, the withdrawal of foreign forces and the deployment of a UN peacekeeping force to oversee the process.[82] Although the agreement is formally labelled as a ceasefire agreement rather than a peace treaty, strong arguments suggest that its content aligns more closely with the latter. This is primarily because both its purpose and text indicate that it aimed for more than just a temporary halt to the hostilities and rather a long-term resolution to the conflict.[83]

What is particularly relevant in this context is the fact that, during the case before the ICJ, Armed Activities on the Territory of the Congo, Uganda referred to the Lusaka Ceasefire Agreement in arguing that it constituted the DRC's consent to the presence of Ugandan troops on the DRC's territory. Additionally, Uganda asserted that the agreement represented more than a mere ceasefire agreement and that the DRC had violated several provisions of the agreement.[84] The ICJ also acknowledged in its ruling in Armed Activities on the Territory of the Congo[85]

[80] Milano, *supra* note 71, p. 1008 and fn 45, which refers to the statement of FRY representative Mr. Jovanovic.

[81] *But see* J. Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 36 Canadian Yearbook of International Law 303 (1999).

[82] Lusaka Ceasefire Agreement (signed on 10 July 1999), para. 11.

[83] A. Lang, *Modus Operandi and ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution*, 40 New York University Journal of International Law and Politics 107 (2008), pp. 115–116.

[84] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Rejoinder Submitted by the Republic of Uganda, 6 December 2002, ICJ Rep 2002, paras. 98, 307–320; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Counter-Memorial of Uganda, 21 April 2001, ICJ Rep 2001, paras. 409–412 (section F).

[85] ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, 19 December 2005, ICJ Rep 2005.

that "[t]he Lusaka Agreement is, as Uganda argues, more than a mere ceasefire agreement. [...] The Agreement goes beyond the mere ordering of the parties to cease hostilities; it provides a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure environment."[86] However, the ICJ refrained from formally classifying the agreement as a peace treaty; nor did it analyse the validity of the agreement in the light of Art. 52 VCLT.[87]

As with the Kumanovo Agreement, in the case of the Lusaka Agreement certain factual circumstances may have called into whether the DRC had accepted some of its obligations under coercion – such as the commitment to engage in dialogue with armed opposition. However, in its ruling, the ICJ avoided assessing the Lusaka Agreement in the light of Art. 52 VCLT, leaving the question of potential coercion unaddressed.[88]

5. THE INTERNATIONAL LAW DILEMMA AND POSSIBLE REMEDY BY THE SECURITY COUNCIL

It follows that the current framework of international law creates tension between two fundamental principles: the interest of achieving peace, ideally as swiftly as possible, and the need to protect the free will of a party to a treaty. The rules concerning the invalidity of international treaties, as discussed above, may constitute a substantial and frequently insurmountable legal barrier to peace. These legal principles can, in practice, hinder diplomatic efforts, where flexibility and compromises in favour of the aggressor may be essential to achieve peace.[89] Consequently, such a legal barrier may pose a challenge even for the victim state, which, at a certain stage, confronted with a superior armed force, might be compelled to consider concessions or may simply be worn down by the cumulative toll of sustained warfare. Although such consequences may initially appear counterintuitive, they reflect the understanding that the purpose behind the relevant treaty rules extends beyond the mere expression of a party's free will. These rules are also designed to safeguard broader principles, particularly the prohibition against the use of force. This fundamental norm would be significantly undermined if an aggressor were permitted to legitimise the outcomes of its unlawful conduct through a treaty, even with the coerced consent of the victim. Ironically, the legal protection of the

[86] *Ibidem*, para. 97.

[87] Lang, *supra* note 84, p. 116; K. Schmalenbach, A. Prantl, *How to End an Illegal War?*, Völkerrechtsblog, 21 April 2022, available at: https://intrechtdok.de/receive/mir_mods_00012532 (accessed 30 June 2025).

[88] *Ibidem*.

[89] *Ibidem*.

prohibition on the use of force may, in effect, contribute to the prolongation of that very use of force.

Facing this legal dilemma, certain scholars argue that an invalidated treaty could be remedied by a UNSC resolution under Chapter VII.[90] Some authors argue that the Security Council is authorised to enforce agreements on states, provided it does not violate *jus cogens* norms.[91] Fox points out that in such a case, even a Security Council resolution could not validate a peace agreement that approves annexation, because the prohibition of annexation constitutes a norm of *jus cogens*. Fox also points out that there is a fundamental difference between the UNSC imposing otherwise valid obligations on states and attempting to validate a treaty that is invalid from the outset.[92] This appears to be a rather convincing argument.

Moreover, there seems to be even stronger argument against the possibility of curing a treaty voided *ab initio* via a Security Council Resolution. This is primarily because a fundamental characteristic of a treaty is consent, and consent itself cannot be substituted by a decision of the UN Security Council. The essence of treaty law requires that agreements are based on the genuine and free will of the parties involved, which cannot be artificially restored through external intervention by the Security Council. Moreover, it does not appear that the Security Council has the authority to remedy treaties that are null and void, even within the scope of its implicit powers under Chapter VII of the UN Charter.[93]

CONCLUSION

It is submitted here that the rule enshrined in Art. 52 VCLT represents a legal obstacle to the conclusion of a peace treaty between Russia and Ukraine that would contain territorial concession from the latter party. The force used by Russia is qualified as unlawful, and given the long-standing and consistent position of Ukraine's representatives,[94] it can be asserted that any renunciation of Ukrainian territory in favour of Russia would not represent an expression of free consent, but would be made under coercion in the form of the unlawful use of force. Therefore, there are strong legal arguments that a peace agreement involving territorial concessions by

[90] F. Herbert, *Territorial Concessions to the Aggressor*, Verfassungsblog, 6 January 2025, available at: https://verfassungsblog.de/territorial-concessions-to-the-aggressor/ (accessed 30 June 2025).

[91] S. Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties*, in: E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011, pp. 320–332.

[92] Fox, *supra* note 2.

[93] S. Talmon, *Security Council Treaty Action*, 62 Revue Hellénique de Droit International 65 (2009).

[94] K. Denisova, *Ukraine Won't Recognize Occupied Territories as Russian as Part of Any Peace Deal, Zelensky Says*, The Kyiv Independent, 12 March 2025, available at: https://kyivindependent.com/ukraine-wont-recognize/ (accessed 30 June 2025).

Ukraine would, under the current circumstances, be deemed invalid under the rule embodied in Art. 52 VCLT. Such invalidity would have serious legal consequences on the possible future presence of Russian forces in the respective territories, as well as on other states – notably the duty to refrain from legalising the purported territorial gains of Russia.[95]

One could raise the valid question of whether any peace treaty may be lawfully concluded under the current legal regime.[96] Considering not only the text, but also the purpose of Art. 52 VCLT, the answer is that the current legal system does not allow a coerced state to make such concessions through international treaties in favour of an aggressor. While it may cause serious practical impediments to any peace process,[97] it is a logical complement to the prohibition of the use of force. If international law were to allow an aggressor to legitimise territorial gains acquired through its unlawful use of force, it would fundamentally undermine the prohibition of the use of force in international law. The principle enshrined in Art. 2(4) of the UN Charter is one of the cornerstones of the modern international legal order, aimed at maintaining peace.[98] Allowing an aggressor to retain territorial gains through coerced treaties would render this fundamental norm meaningless.

However, despite the above, the judicial practice regarding Art. 52 VCLT has been limited and often cautious. Cases such as *Fisheries Jurisdiction (UK v. Iceland)* and *Aminoil v. Kuwait* suggest that courts (tribunals) require strong evidence that coercion deprives a state of free will. Additionally, the ICJ has previously dismissed claims of coercion when the affected state did not contest a treaty's validity over an extended period. The experience with the Kumanovo Military Agreement and Lusaka Ceasefire Agreement also show that practical concerns may sometimes prevail over the legal regime.

[95] Rasmussen, *supra* note 65, pp. 47–48; Kehl, *supra* note 2; Vishchyk, Pizzi, *supra* note 22.
[96] Kehl, *supra* note 2; Schmalenbach, Prantl, *supra* note 89.
[97] Schmalenbach, Prantl, *supra* note 89.
[98] Gray, *supra* note 14, pp. 6–30.

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SUITABILITY OF THE PRINCIPLE OF NON-INTERVENTION TO REGULATE CYBER INFORMATION OPERATIONS TARGETING ELECTIONS

Abstract: *The principle of non-intervention belongs amongst the most often discussed rules of international law with the potential to regulate cyber information (dis- and misinformation) operations carried out by one state and dedicated to influence another state's elections results (through the electorate). Contributions to those discussions differ significantly however as to the suitability of the rule for this purpose. This article tackles the issue in a step-by-step analysis, first dealing with the elements of the principle of non-intervention and its position in the systematics of the law of international peace and security, secondly analysing the applicability of the rule in cyberspace, in order to thirdly determine and evaluate what are the critical issues in the application of the rule to cyber information operations targeting the electorate of another state. Because the principle belongs to the most approximate rules of international peace and security regulation to tackle these operations, the last section is dedicated to recommendations that if applied, they might increase the likelihood of the applicability of the principle of non-intervention to the operations discussed.*

Keywords: principle of non-intervention, cyber information operations, elections

INTRODUCTION

States have often attempted to influence the public opinion in other states. While propaganda has generally not been considered as violating international law, the reason might be seen before the invention of mass communications tools in the fact that propaganda delivery was complicated without accessing the territory of

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the target state; consequently, it was limited by the regulation to resort to force. Propaganda was thus not regarded with interest by states.

Inventing modern media, and especially utilization of the internet and social media, have however technologically allowed the spread of information across borders without the need to physically cross them. By this development, previously existing reasons for not regulating propaganda suddenly disappeared and states are now facing a new situation and the need to legally address it. This issue is an example of the famous question: is international law (as it is) applicable to cyberspace or does it need to be updated?

Naturally, influencing a target state's public opinion via cyber tools is only possible as long as the targeted population has access to the internet and wishes to consume the information. That explains the interest regarding this issue in states with high portions of their populations using the so-called social media. The issue is exacerbated by the utilization of bots[1] that may share and multiply information on a previously unforeseen scale.

While sharing information on the social media (and internet in general) may have positive consequences, it can also be used for nefarious purposes.[2] A seemingly straightforward way to fight against them is to properly verify received information, however making a qualified opinion when overflown with false or manipulating information may be extremely difficult.

Cyber influence campaigns (or operations) targeting populations of various states, particularly in the short period before elections, have been publicly reported already.[3] Considering the fact that sometimes, the elections results are very close, the potential of such operations to change them is not negligible.

As a consequence, states and doctrine began discussing suitability of international law rules to regulate the campaigns in question. These most often analysed

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[1] "[B]its of code designed to interact with and mimic human users." B. Sander, *Democracy under the Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 Chinese Journal International Law 1 (2019), p. 12.

[2] For a human rights-based perspective, *see e.g.* M. Hanych, M. Pivoda, *Disinformation and Fake News in Current Jurisprudence of the Strasbourg Court: An Unsolved Problem*, in: G. Terzis, G. Terzis, D. Kloza, E. Kużelewska, D. Trottier (eds.), *Disinformation and Digital Media as a Challenge for Democracy*, Intersentia, Cambridge: 2020.

[3] *E.g.* R.S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, vol. 1 of 2, US Department of Justice, Washington: 2019, available at: https://www.justice.gov/archives/sco/file/1373816/dl?inline= (accessed 30 June 2025) (Mueller Report). Several cyber operations targeting elections (usually without dealing with attribution) were also described on pp. 36–37 of M.N. Schmitt, *"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19(1) Chicago Journal of International Law 30 (2018). In Romania, the Constitutional Court even annulled 1st round of presidential elections in 2024 on the basis of foreign interference. S. Rainsford, *Romanian court annuls result of presidential election first round*, BBC.com, 6 December 2024, available at: https://www.bbc.com/news/articles/cn4x2epppego (accessed 30 June 2025).

rules include the international law-based principles of non-intervention and/or sovereignty,[4] due diligence,[5] or self-determination.[6]

This article is focuses on the principle of non-intervention[7] and its goal is to assess its suitability in its current state in international law to regulate cyber disinformation and misinformation campaigns that target another state's electorate's voting. And if it is found unsuitable, to make recommendations as how to reinterpret it in order to satisfy the suitability. At the same time, the article leaves aside information operations conducted by non-state actors, except those whose activity is attributable to a state. The reason is that the principle of non-intervention applies on the interstate level.[8] It also leaves aside the issue of the regulation of foreign media residing in the target state and their regulation.[9]

To reach its goal, the article first needs to confirm a hypothesis (that even though the principle of non-intervention crystallized long before invention of cyberspace, it *is* generally applicable in this domain; at the same time however, its elements as they are understood now may not be applied in a way that would fit easily with the dis- and misinformation operations attempting to influence the target state's electorate in its voting). Subsequently, should the hypothesis be found incorrect, the principle would be suitable to regulate the campaigns in question. Since however research confirmed it to be correct, upon reaching its confirmation, the article addresses the research question: how do the elements of the principle of non-intervention need to be changed or reinterpreted in order for the principle to be suitable to regulate these operations?

Since problematic elements are identified, the last section builds upon them and identifies recommendations that, if applied, would increase the likelihood of applicability of the principle of non-intervention to the campaigns in question.

Thus, following necessary terminology and opening the topic, the text addresses the principle of non-intervention, its elements, and applicability in cyberspace (section 2). In section 3, it evaluates the principle's applicability to the dis- and

[4] *See e.g.* the references to it by states' representatives in the Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, 13 July 2021, A/76/136, available at: https://docs.un.org/en/A/76/136 (accessed 30 June 2025) (2021 Compendium).

[5] *E.g.* Sander, *supra* note 1, pp. 24–26.

[6] *E.g.* J.D. Ohlin, *Election Interference*, Cambridge University Press, Cambridge: 2020, pp. 90–117.

[7] The term interference is understood here as any activity within another state's sovereign sphere regardless of its legality, while intervention is a narrower concept limited to illegal/prohibited form that the principle of non-intervention covers.

[8] Schmitt, *supra* note 3, p. 48.

[9] For this topic, *see e.g.* M. Říha, *Freedom of Speech, Propaganda and EU at War: Case of Russia Today France*, 14(1) The Lawyer Quarterly 111 (2024).

misinformation operations targeting another state's electorate and the last chapter addresses the recommendations.

1. TERMINOLOGY AND SETTING THE SCENE

Campaigns targeting another state's electorate fit within so-called influence operations. And two types of influence operations[10] need to be distinguished: so-called doxing operations that utilize hacking electronic systems and leaking of non-public information found there,[11] and information operations.[12] Distinguishing the types of information operations turns out to be terminologically problematic, however. They are sometimes divided into malinformation and disinformation,[13] sometimes misinformation and disinformation,[14] and occasionally misinformation, malinformation, and disinformation are being distinguished.[15] This article adopts the differentiation used for example by the Australian authorities:

> Misinformation is false information that is spread due to ignorance, or by error or mistake, without the intent to deceive. Disinformation is knowingly false information designed to deliberately mislead and influence public opinion or obscure the truth for malicious or deceptive purposes.[16]

Consequently, the difference between disinformation and misinformation is in the intent. Both consists of false information, but a disinformation is spread

[10] M. Roscini, *International Law and the Principle of Non-Intervention*, Oxford University Press, Oxford: 2024, p. 396.

[11] Sander, *supra* note 1, p. 8. An example of hack and release operation was claimed to have happened by the Mueller, *Report...*, *supra* note 3, p. 1: "a Russian intelligence service conducted computer-intrusion operations against entities, employees, and volunteers working on the Clinton Campaign and then released stolen documents."

[12] Mueller, *Report...*, *supra* note 3, p. 1: "a Russian entity carried out a social media campaign that favored presidential candidate Donald J. Trump and disparaged presidential candidate Hillary Clinton." Instead of using term information operation, the Mueller Report claimed (p. 4) existence of "a social media campaign designed to provoke and amplify political and social discord in the United States." Thus, whether/how to identify it as a particular information operation depends on further aspects.

[13] Roscini, *supra* note 10, pp. 396–397.

[14] *See e.g. Disinformation and Misinformation*, Australian Electoral Commission, available at: https://www.aec.gov.au/About_AEC/files/eiat/eiat-disinformation-factsheet.pdf (accessed 30 June 2025).

[15] *See e.g. Misinformation, Disinformation & Malinformation: A Guide*, rinceton, available at: https://princetonlibrary.org/guides/misinformation-disinformation-malinformation-a-guide/ (accessed 30 June 2025).

[16] *Disinformation...*, *supra* note 14. There are other similar definitions. Disinformation may be defined as epistemically wrong massively spread information intentionally manipulating the addressees in order to cause harm. T. Koblížek, M. Hanych, J. Kalenský, *Dezinformace a hate speech z hlediska filozofie, práva a bezpečnosti* [Disinformation and Hate Speech from the Perspective of Philosophy, Law, and Security], Academia, Praha: (to be published in 2025), ch. 1.

deliberately, while misinformation is spread without the intent to deceive by the last sharer (though the original source may have different motives). And it is exactly the possibly of malicious intent by the original source that last "sharer" of the information may be unaware of why this article includes misinformation into the research question.

The focus of this article is upon cyber information operations carried out by one state and targeting the electorate of another state to compel it to vote in a certain way or to refrain from voting. For simplicity, this article will call them *cyber electorate targeting information campaigns* (CETICs).[17] They will often be compared to doxing operations and so-called cyber tampering operations[18] however.

Though not explicitly addressing the dis-/misinformative topic (that this article considers an element of a CETIC) and also taking into account that this article works on the assumption of attribution of a CETIC to a state (while the relationship between the Internet Research Agency and Russian government remains unclear[19]), an otherwise fitting example of a CETIC that this article focuses upon is the Mueller Report's claimed Internet Research Agency's (IRA)[20] activity:

> The IRA conducted social media operations targeted at large U.S. audiences with the goal of sowing discord in the U.S. political system. [footnote omitted ...] Using fictitious U.S. personas, IRA employees operated social media accounts and group pages designed to attract U.S. audiences. These groups and accounts, which addressed divisive U.S. political and social issues, falsely claimed to be controlled by U.S. activists. Over time, these social media accounts became a means to reach large U.S. audiences.
>
> IRA employees posted derogatory information about a number of candidates in the 2016 U.S. presidential election. By early to mid-2016, IRA operations included supporting the Trump Campaign and disparaging candidate Hillary Clinton.[21]

Thus, "the objective was not only to convince individuals how to vote, but also to keep certain voters from the polls."[22] This exact kind of operation is considered to be within the grey zone of normative uncertainty of influence operations targeting elections. They are neither widely recognized as constituting violation of the

[17] Terms used by other authors such as elections meddling, disenfranchisement, etc. are avoided here because they are not specific enough to exclude for example doxing operations and tampering operations (*see* below). At the same time, the word "cyber" is used to point out that focus is on social media and other internet campaigns.

[18] Operations that hack the elections counting systems and change the results therein or the casted ballots. *Similarly see* Sander, *supra* note 1, p. 4.

[19] Schmitt, *supra* note 3, p. 35.

[20] A Russian entity once funded by Y.V. Prigozihin (Mueller, *Report...*, *supra* note 3, p. 14).

[21] *Ibidem*, p. 14.

[22] Schmitt, *supra* note 3, p. 35.

principle of non-intervention (like cyber tampering operations), nor are they clearly considered legal (like for example, media newsfeed with a clear source).[23]

2. PRINCIPLE OF NON-INTERVENTION, ITS ELEMENTS, AND APPLICABILITY IN CYBERSPACE

In order to assess suitability of a certain rule to a certain situation, it is necessary first to establish its elements. For that reason, this section explains the principle and finds out whether it is applicable in cyberspace because should the answer be negative, the entire debate would be pointless. In explaining the elements, the article also points out critical issues that will play a significant role in the subsequent section.

Although the principle of non-intervention belongs to the core of international peace and security regulation, it was omitted by the authors of the UN Charter[24] in its explicit textual regulation. The closest reference to it can be found in Art. 2(7) UN Charter,[25] however that provision applies to the relationship between the UN and its member states, not to the interstate level.

The principle can be however deduced implicitly from rules contained in Art. 2 UN Charter.[26] Non-intervention is closely related to the principle of equal sovereignty of states contained in Art. 2(1) of the UN Charter,[27] in fact it is considered as its corollary.[28] A state independent of any other power than its own (sovereign) is logically entitled to demand no intervention in its internal and/or external affairs (that in fact being the key point of the principle of non-intervention), otherwise it would not be independent.[29]

[23] *See e.g. ibidem*, p. 50.

[24] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter).

[25] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[26] F. Delerue, *Cyber Operations and International Law*, Cambridge University Press, Cambridge: 2020, p. 235.

[27] Ohlin, *supra* note 6, chapter 3. On p. 71, the author highlights the reference to non-intervention in the Montevideo Convention (Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1936) 165 LNTS 19) and its connection to sovereignty as its basis. The principle is similarly closely connected to the use of force prohibition as the ICJ noted in ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Rep 1986, p. 14, para. 212 (*Nicaragua* judgment).

[28] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 202. *See also* M.N. Schmitt, L. Vihul (eds.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations Prepared by the International Groups of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence*, Cambridge University Press, Cambridge: 2017, p. 312 (rule 66) (Tallinn Manual 2.0); or Delerue, *supra* note 26, pp. 233–234.

[29] Even the very first sentence (para. 202) of the *Nicaragua* judgment dealing with the principle states: "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside *interference*."

The principle of non-intervention has been elaborated upon by the International Court of Justice (ICJ) in its *Nicaragua* judgment.[30] Based upon it, the obvious case of a violation of the principle of non-intervention is a forcible intervention that deprives the target state of its free will to govern its territory. The ICJ divided forcible intervention into two subcategories - direct intervention where one state uses force against another, and indirect one involving "support for subversive or terrorist armed activities within another State."[31] By this notion, the ICJ also confirmed that supporting armed groups in another state may constitute a use of force.[32] Confirmation of the possibility of indirectness of non-forcible intervention is however a controversial topic . In order to be applicable to CETICs, the principle must however also cover non-forcible and indirect forms of intervention. For that reason, this article addressed this topic in section 3.

In the same judgment, the ICJ confirmed two elements of the principle: a) internal or external affairs of a state (*domaine réservé*[33] or sovereign discretion[34]),[35] and b) coercion.[36]

These two elements (*domaine réservé* and coercion) complement each other, and the principle of non-intervention is thus based on the prohibited nature of deprivation of the free will of target state in the sphere that it is entitled to decide on its own.

By virtue of general international law, *domaine réservé* denotes spheres in which every state is entitled to make free decisions without outside intervention. It includes "political, economic, social and cultural system, and the formulation of foreign policy."[37] As such it covers both internal as well as external affairs.[38] It should be

[30] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para 205.

[31] *Ibidem*.

[32] *E.g. ibidem*, para. 241. For analysis of supporting a state, not an armed group, by providing weapons, *see e.g.* M. Lipovský, *Assessing the Legal Boundaries of Military Support to Ukraine from the Perspective of Use of Force*, 50(1–2) Review of Central and East European Law 87 (2025).

[33] "[T]hose matters on which international law does not speak or that international law leaves solely to the prerogative of States [...] and are therefore to be regarded as protected from intervention by other States." Schmitt, Vihul, *supra* note 28, p. 314 (rule 66). Note that *domaine réservé* is sometimes understood as synonymous only to internal affairs. External affairs left to state's free will are however also part of this element and they include "choice of extending diplomatic and consular relations, recognition of States or governments, membership in international organisations, and the formation or abrogation of treaties." *ibidem*, p. 317. To simplify the references in this article however, the first element is called *domaine réservé* and understood as including both the internal and external affairs.

[34] Term used by Ohlin, *supra* note 6, p. 72.

[35] Although the Court did not use the term *domaine réservé*, it basically described it in para. 205 of the ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely."

[36] "Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones" (*ibidem*, para. 205).

[37] *Ibidem*.

[38] Also confirmed by Schmitt, Vihul, *supra* note 28: "Rule 66 – Intervention by States: A State may not intervene, including by cyber means, in the internal or external affairs of another State."

noted that this statement depends on general international law. States are obviously allowed to voluntarily limit their *domaine réservé* in mutual relations and even allow for other states to exercise their powers within those areas.[39] It will turn out that this element is not problematic from the perspective of applying non-intervention to CETICs (see next section).

The same may not be stated about coercion though. This second element is based on removal of free will of the coerced actor.[40] In written sources of international law, the term is used for example in Art. 52[41] of the Vienna Convention on the Law of Treaties (VCLT).[42] This provision confirms the absolute invalidity of a (would be) treaty in case of coercion of a state by the threat or use of force contrary to the principles of the UN Charter in relation to its conclusion. Thus, the provision confirms coercion to be based upon removal of free will.

When explaining coercion, other sources refer to subordination[43] or subjugation,[44] or dictatorial character of interference.[45] By doing so, they also point out a common basis in the removal of free will of the coerced actor. In the Tallinn Manual 2.0, the element is claimed not to be defined by international law and understood as "an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way [footnote omitted]."[46]

As is visible from the various descriptions of the second element, coercion rests in removal of free will but it may not relate to *anyone*'s free will, it must focus on the will of the targeted state. Even the other article of the VCLT that refers to coercion[47] speaks of bending the will of the targeted state ("expression of a state's consent") through

[39] *See ibidem*, comment on p. 316.

[40] Its precise content is somewhat foggy and disputed (Sander, *supra* note 1, p. 21) and must thus be deduced from sources working with it on a case-by-case basis.

[41] "Article 52 Coercion of a State by the threat or use of force: A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." For a contribution focusing on Art. 52 VCLT and its effects upon peace treaties, *see e.g.* K. Urbanová, *Potential Peace Treaty Solution for the Ukraine Conflict and its Validity under International Law*, 44 Polish Yearbook of International Law 49 (2024).

[42] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[43] Annex to the UNGA Resolution of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Doc. A/RES/2625(XXV), p. 123.

[44] Ohlin, *supra* note 6, p. 73.

[45] Para. 98 of the Dissenting opinion of Judge Schwebel to ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Rep 1986.

[46] Schmitt, Vihul, *supra* note 28, p. 317.

[47] "Article 51 Coercion of a representative of a State: The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."

subjugation of free will of its representative when performing governmental functions. While it is obviously possible to imagine that a state coerces another state's private individual inhabitant and such action may even violate international law norms, such as human rights, the element of coercion in such a situation will not be necessarily related to the will of the state of nationality of the coerced individual. That turns out to be one of the crucial points as will be seen in the next section.

And this point hits the crucial issue of applicability of non-intervention to CETICs. As the next section highlights, during these operations, the direct target is not the state itself, but its electorate (in order to compel it – deprive of free will – to vote differently than they otherwise would and hence deprive the state of its free will regarding populating its organs). For that reason, the next section includes an analysis upon this issue.

Another matter that might be problematic for the next section is whether, in order to fulfil the element of coercion, its consequences must materialize or not? Should they be required to materialize, a failed CETIC would be outside of the regulation in any case. However, requiring materialization of coercion to allow for the applicability of the principle of non-intervention would be too radical. It would paradoxically exclude the principle's protection from those that would manage to resist the coercion, even at high stakes. Thus, all that is necessary is to coerce, not to be successful in it.[48] For that reason, the next section does not discuss this issue extensively.

Before delving specifically into interpreting the elements of non-intervention in relation to CETICs, it is also necessary to confirm the applicability of the principle to cyberspace and activities conducted therein. Without such confirmation, combined with the fact the CETICs by definition take place in cyberspace, any subsequent discussion would be without merit.

The applicability of rules of international law in cyberspace is debated for several decades already. For example, the famous Tallinn Manual series[49] represent a large doctrinal work focusing among others on the international peace and security rules, including the principle of non-intervention. Neither states nor intergovernmental organizations stayed away and convened six Groups of Governmental Experts (GGEs)[50] and two Open-ended Working Groups (OEWGs).[51] Both GGEs and

[48] Schmitt, Vihul, *supra* note 28, p. 322.

[49] There are currently 2 Tallinn Manuals completed with third being worked upon. *See Webpage*, NATO Cooperative Cyber Defence Centre of Excellence, available at: https://ccdcoe.org/research/tallinn-manual/ (accessed 30 June 2025).

[50] *See Webpage*, United Nations, available at: https://disarmament.unoda.org/group-of-governmental-experts/ (accessed 30 June 2025). The sixth GGE (2019-2021) submitted the UNGA, *Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, 14 July 2021, A/76/135, available at: https://docs.un.org/en/A/76/135 (accessed 30 June 2025). The report is accompanied by the 2021 Compendium.

[51] The first OEWG (Open-ended working group on developments in the field of information and telecommunications in the context of international security – *Open-ended Working Group*, United Nations,

OEWGs operated under the auspices of the United Nations and either focused or touched upon the issue of application of international law to cyberspace.

Crucially for applicability of the principle of non-intervention to CETICs, it may be summarized that both states and a majority of authors of the doctrine do not see it questionable whether international law applies to cyberspace or not, it simply does.[52] And that obviously including the principle of non-intervention.[53]

There remains however hesitation as to whether the principle as it currently is needs any update or is applicable in cyberspace without changes. The nature of cyberspace[54] complicates the matter because activities within cyberspace have a naturally foggy transboundary character while the principle of territoriality is strongly embedded in many rules of international law, particularly the rules of international peace and security like the principle of non-intervention.[55] The focus of this article is however on CETICs that are an activity of one state that attempts to[56] succeed in coercion of another state. In such situation, the extraterritorial aspect is clearly fulfilled and thus the unclear borders of jurisdictions of states in cyberspace do not present a problem. It must be admitted though that it is an interesting topic worth addressing in further research.

Based on this section, three particular issues may be identified as problematic for the research question, all of them related to coercion. Firstly, in order to be applicable to CETICs (inherently nonforcible action), the principle of non-intervention must also cover both forcible and non-forcible coercion. Secondly, the possibility of indirectness (e.g. through an electorate instead of the state directly) of non-forcible coercion remains to be confirmed. And thirdly, it might also be claimed that online campaigns may be "only" participation in discussions rather

available at: https://disarmament.unoda.org/open-ended-working-group/ (accessed 30 June 2025) already submitted final report. The work of the second OEWG (*Open-ended Working Group on security of and in the use of information and communications technologies*, United Nations, available at: https://meetings.unoda.org/open-ended-working-group-on-information-and-communication-technologies-2021 (accessed 30 June 2025) is currently in progress.

[52] *See e.g.* statements in the 2021 Compendium of representatives of Australia (p. 3), Brazil (p. 17), Estonia (p. 23), Germany (p. 31), Japan (p. 46), the Netherlands (p. 55), Norway (pp. 65 and 66), Romania (p. 75), Singapore (p. 82), or Switzerland (p. 86).

[53] Explicitly stated e.g. by representatives of Estonia (p. 25), the Netherlands (p. 55), Singapore (p. 83), and Switzerland (p. 88) in the 2021 Compendium. Also see rule 66 of the Schmitt, Vihul, *supra* note 28.

[54] For example, defined on p. 12 of the Schmitt, Vihul, *supra* note 28 by three components – physical, logical and social.

[55] For example, the ICJ claimed that "[t]he effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention." ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Rep 1986, para. 251.

[56] Attempt is considered in this article to be an operation that was conducted but did not succeed in its goals (changing the elections results). As coercion does not need to be successful for the principle of non-intervention to be violated, this difference is legally insignificant.

than coercion – claiming it does not have the capacity to remove the free will of the individual voters.

Consequently, the following section, after dealing with *domaine réservé*, addresses these three issues identified above specifically.

3. SUITABILITY OF THE PRINCIPLE OF NON-INTERVENTION TO REGULATE CETICS

This section is divided according to the elements of the principle of non-intervention and elaborates upon them in connection with the CETICs, focusing particularly on the above-noted problematic issues.

3.1. Domaine réservé

Holding elections and announcing their results are without a doubt matters that fit within the core of *domaine réservé* of each state.[57] As a fundamental mechanism of populating democratic state's organs, elections are considered an essential aspect of political system, and it should be stressed that "[e]very State possesses a fundamental right to choose and implement its own political [... system]."[58]

Thus, this element is fulfilled in the case of CETICs. Nonetheless, a point highlighted in connection with coercion – the matter of its indirectness – needs to be addressed here as well due to their interplay. An argument against the conclusion that CETICs affect the *domaine réservé* might be that the target is not the state itself but rather its population. To answer such hypothetical argument from the perspective of *domaine réservé*, it should be stressed that

> [i]ntervention into the *domaine réservé* of a State need not be directed at State infrastructure or involve State activities. Rather, the key to satisfaction of this first element of intervention is that the act in question must be designed to undermine the State's authority over the *domaine reserve*.[59]

Because there is no doubt that holding and properly administering elections are matters of sovereign authority of each state, interference within them undermining such authority must be considered as negatively affecting the *domaine réservé*. From the perspective of the CETICs, the element of *domaine réservé* is fulfilled.[60]

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[57] As confirmed e.g. in the statement of representative of Brazil on p. 19 to the 2021 Compendium.

[58] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 258.

[59] Schmitt, Vihul, *supra* note 28, p. 315 (rule 66).

[60] Obviously, there are other aspects that need to be taken into account in a comprehensive assessment of any cyber campaign. Particularly the matter of the attributability of such campaign. For debates on

3.2. Coercion

In the previous sections, the element of coercion has been identified as problematic to the suitability of the principle of non-intervention to CETICs with regard to particularly three topics. They are thus dealt with individually in the following text and recommendations contained in the sub-sections are reflected in section 4.

3.2.1. Coercion only via threat or use of force (forcible) or also by other means (non-forcible)?

An issue that may present a problem is understating of the material contents of coercion. In general, coercion might be understood as limited to a physical act of violence or threat of it that leads to a change in the target's behaviour. On the interstate level, that analogy would be fulfilled by a use of force or threat of use of force (as confirmed by the ICJ). Such limited understanding might be seemingly supported by Art. 52 VCLT. And should the understanding of coercion be limited to forcible traits, non-intervention would have no potential to regulate CETICs. The reason would rest in the fact that there is no physical compulsion, or its threat imposed upon that electorate or the targeted state itself. CETICs are conducted cybernetically and nonforcibly.

Coercion is however not limited to the means of imposing physical (military) force or its threats.[61] Even Art. 51 VCLT itself accepts a possibility of coercion through others acts, although not enumerated. While not every nonforcible measure will be coercive, it does not automatically mean that every coercion has to be physical, violent, or military in the interstate context.[62] Coercion may in fact take various forms, the use of force and its threats including, but also encompassing economic or diplomatic coercion.[63] Also, the conclusion that cyber tampering operations constitute a violation of non-intervention confirms that coercion does not necessarily need to be forcible. Cyber tampering operations are also nonforcible.

From the perspective of this point, there would be no problem in the application of the non-intervention principle to CETICs, yet it needed to be made taking into account the fact that the ICJ was not clear upon the issue yet as discussed above.

3.2.2. Indirectness of coercion

Similar to the perspective of *domaine réservé*, the indirect nature of nonforcible coercion poses a problem. Cyber tampering operations (consisting of hacking another state's counting systems and changing the casted ballots or already counted

attributability of activities within cyberspace, *see e.g.* N. Tsagourias, M. Farrell, *Cyber Attribution: Technical and Legal Approaches and Challenges*, 31(3) European Journal of International Law 941 (2020).

[61] Explicitly stated in 2021 Compendium by the representative of Germany (p. 34).

[62] *See e.g.* Ohlin, *supra* note 6, p. 78.

[63] Delerue, *supra* note 26, pp. 237.

results in the system) must be assessed differently from CETICs. Since in the former, coercion would surely be established[64] due to its direct nature,[65] such action would constitute a violation of the principle of non-intervention.[66] The targeted state is directly coerced into establishing another result of its elections.

In case of CETICs, the targeted state is not coerced *directly*, however. The campaign is focused at its population with the intent of changing its political views / opinions in order to make them decide differently when casting the ballots. The desired result might be the same – the outcome of the elections being different. Nonetheless, the indirectness of nonforcible coercion presents a challenge to the applicability of the principle of non-intervention.

In order to find out to what extent can nonforcible coercion be indirect, it is possible to get inspired by the previous case law of the ICJ. In context of indirect nonforcible intervention, the ICJ has excluded economic pressure, such as imposition of embargoes and withdrawal of economic aid, from the notion of intervention.[67] By doing so, it may seem that it excluded indirect nonforcible coercion from the elements of the principle of non-intervention as such.[68] Such a conclusion would similarly exclude CETICs targeting the population of another state with the intention of changing elections results due to the indirectness of such nonforcible action. However, the ICJ's conclusion should not be overstated.

Firstly, the Court was extremely brief in the statement and did not elaborate upon it in more than one sentence.[69] Secondly, it can hardly be stated that there is

[64] Since coercion is fulfilled when the targeted state is deprived of free will to establish election results and thus of populating its representative political bodies according to its own will.

[65] Because in such operations, the acting state itself directly acts and changes the results.

[66] Schmitt, Vihul, *supra* note 28, p. 313. See also expressions of state representatives in the 2021 Compendium (e.g. Australia, p. 5); on p. 69, the Norwegian representative went as far as to claim that violation of non-intervention could be even committed by "cyber operations with the intent of altering election results in another State, for example by [...] unduly influencing public opinion through the dissemination of confidential information obtained through cyber operations ('hack and leak')". The text does not however relate such violation to indirect coercion. It may be (though not stated so explicitly either) that it rather relates to exercising governmental powers within another state's jurisdiction without its consent. It is similarly not clear how to interpret the US position on p. 140: "a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention."

[67] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 245. While the Court did not elaborate on it in detail, the reason may rest in the indirectness of the activity as well as refusal of states to accept economic pressure as intervention.

[68] Especially considering that unlike in case of economic pressure, the Court found indirect forcible coercion via providing "support for subversive or terrorist armed activities within another State" as both violation of the prohibition of use of force and the principle of non-intervention (*ibidem*, para. 205).

[69] As opposed to the ICJ, the authors of the Tallinn Manual 2.0 on one hand agreed that economic measures do not generally amount to intervention, but they also acknowledged view distinguishing two situations. First one involves free choice of trading partners (no intervention generally established by it); the second different scenario however "involve[s] active technical measures, rather than simply desisting from trade" (Schmitt, Vihul, *supra* note 28, p. 324).

a consensus upon the exclusion of every possible economic measure to be outside of the scope of coercion.[70] Afterall, even the Friendly Relations Declaration counts with economic measures when referring to coercion by stating that "[n]o State may use or encourage the use of *economic*, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind [highlighting added]."[71] And last but not least, when it comes to intervention, rather than indirectness or directness of coercion, it may be that "[t]he key is that the coercive act must have the potential for compelling the target State to engage in an action that it would otherwise not take (or refrain from taking an action it would otherwise take)."[72] Thus, it is not that easy to exclude indirect nonforcible coercion consisting of economic (or any other) pressure from the principle of non-intervention. In fact, there is a lot to conclude positively. And the conclusion similarly applies to indirect coercion via CETICs.

Furthermore, even if the controversial nature of the economical character of coercion is taken into account, such measures should be distinguished from pressure upon the fundamental processes of the constitutional order of a target state. Those are not matters related to free economic choices, i.e., an issue that arguably is behind the opposition to economic pressure being qualified as coercion.

Consequently, based on the requirements of international law, a CETIC designed to produce a different outcome in a process of filling political positions (such as elections) may not be automatically excluded from the notion of coercion; despite it being imposed indirectly and nonforcibly. As long as there is a sufficiently close casual nexus[73] between the campaign and the possibly different outcome of

[70] "Although there might not be customary law norms against economic coercion generally, some argue that specific forms of economic coercion might be illegal. Unless the countries involved have specific treaty commitments between them, the arguments for illegality would be based upon interpretations of the principles of the prohibition of intervention, and the prohibition of the use of force, as noted above and as found in the UN Charter" (B.E. Carter, *Economic Coercion*, in: *Max Planck Encyclopedia of Public International Law*, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1518 (accessed 30 June 2025)).

[71] UNGA Resolution of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Doc. A/RES/2625(XXV), p. 123.

[72] Schmitt, Vihul, *supra* note 28, p. 319.

[73] The requirement of causality and whether the causal nexus between effect and coercion must be direct or not was addressed by majority of the Tallinn Manual experts positively when they agreed that even an indirect causal nexus suffices (*ibidem,* p. 320). Such conclusion makes sense, especially considering the fact that the effect does not even need to materialize (intervention be successful) in order for the violation of non-intervention to occur. Thus, demanding strict application of direct causal nexus would run against the logic of the principle.

an election, the element as it is defined in international law now, may be in fact considered fulfilled.

However, it must be accepted that such conclusions are rather theoretical, and practice and opinions of states do not actively confirm it yet. The conclusion is rather that the law as it exists, does not contravene the conclusion. It remains necessary for states to explicitly support this understanding of coercion in order to guarantee the applicability of the rule to CETICs. Thus, the need to confirm the possibility of indirectness of nonforcible coercion is reflected in the first recommendation contained in the next section.

Additionally, while effectivity of CETICs in changing opinions is notoriously hard to prove, fulfilling the element of coercion does not require its success. Consequently, the ambiguity regarding success of the campaigns is not an obstacle in fulfilling the element of coercion.[74]

3.2.3. Coercion or deception?

The last identified problematic cluster of aspects of the suitability of the principle of non-intervention to CETICs relates to the difference between discussion and deception and whether the latter may qualify as coercion while the former may not. The issue was brought up by Jens D. Ohlin who stated when commenting upon the Russian campaign preceding the 2016 US elections as follows: "True, the Russians sought to influence the outcome of the election and moreover they did so with deception. But deception is not the same thing as coercion."[75]

In other words, even if coercion can be indirect and nonforcible, the question remains whether influencing public opinion (and then elections results) is anything more than just a debate or propaganda (i.e., not coercive because debate does not remove free will of the target) as opposed to coercing a certain result. The outcome of accepting that deception is noncoercive would be that CETICs would not fulfil the criterion of coercion. Ohlin further points out, that "legal requirement of coercion [...] tracks the methods used"[76] rather than the result it brings or may bring. Together with the distinction from deception, that is another key in this argument. Because this article submits that deceptive actions may indeed be coercive, it needs to tackle the counterarguments raised and the following text first addresses the latter one.

Regarding the issue of coercion being defined by methods used, the question is whether fulfilling the element of coercion rest in the methods (as Ohlin put it)

[74] In any way, measuring the possible effects of CETICs will heavily depend on technical capabilities and availability of data from for example social media (through so-called data mining) where the operations took place.

[75] Ohlin, *supra* note 6, p. 82.

[76] *Ibidem*, p. 83.

or whether the key is rather that it simply "must have the potential for compelling the target State to engage in an action that it would otherwise not take (or refrain from taking an action it would otherwise take)"[77] regardless of the method that was applied – in fact the argument raised above and accepted by the author of this article. Ohlin tends to the methods, the result being that he disqualifies CETICs from coerciveness.

While the argument has certain merits, it does not corelate with the opinions of some states. For example, the German representative contributed to the 2021 Compendium by stating that "cyber measures may constitute a prohibited intervention under international law if they are comparable in scale and effect to coercion in non-cyber contexts [highlighting removed]."[78] Thus, instead methods used, the focus is on the results and their scale and effects. Similarly, Steven J. Barela suggests that scale and reach of an operation should be the defining concepts when considering whether an operation is coercive or not.[79] Thus, it is suggested here (and in the second recommendation stated in the next section), that instead of methods, it should be the scale and effects[80] of operation that define it as coercive. Once again, the conclusion however needs stronger confirmation by state practice and opinions and that is why it is included in the second recommendation in next section.

The other key to Ohlin's argument is the distinction between coercion and deception. And it must be admitted again that the argument is persuasive, nonetheless not completely bulletproof. It is suggested here that the deceptive nature of CETICs is actually an element that helps to understand them as coercive as opposed to campaigns with a clear source.

Elections are a tool for democratic states to populate their political and some other constitutional organs. Thus, democratic states decide who will be their representatives by elections. By intervening into the electorate's decision-making process, the interfering state attempts to compel the target state to respect someone else as its representative than it otherwise would. And what makes this operation different from "mere" propaganda is exactly its covert nature. If the source was clear, the electorate would understand that the reason behind the information might be an attempt to manipulate. But when the operation is of a covert nature (for example through the use of social media profiles pretending to be local citizens

[77] Schmitt, Vihul, *supra* note 28, p. 319.

[78] 2021 Compendium, p. 34.

[79] S.J. Barela, *Zero Shades of Grey: Russian-Ops Violate International Law*, Just Security, 29 March 2018, available at: https://www.justsecurity.org/54340/shades-grey-russian-ops-violate-international-law/ (accessed 30 June 2025).

[80] With respect to effects, it must be noted that it should rather be defined as 'expected effects' or the operation's *reach* because coercion does not need to materialize, as it was stated above, and yet prohibited intervention may occur.

and/or organizations), the information coming from the operation only seems to stem from those who have the right to decide/elect rather than from a foreign state. The targeted electorate may consequently consider such information as legitimate contributions to public debate rather than an attempt to manipulate them and change whom they will vote.

It might be legitimately stated that in operations like these that occurred, it was exactly

> the covert nature of the troll operation [that] deprive[d the] electorate of its freedom of choice by creating a situation in which it could not fairly evaluate the information it was being provided. As the voters were unaware that they were being manipulated by a foreign power, their decision making, and thus their ability to control their governance, was weakened and distorted. The deceptive nature of the trolling is what distinguishes it from a mere influence operation.[81]

In conclusion, the deceptive nature of the operation might be in fact understood as exactly the point that shifts CETICs towards coercion (regarding populating the target's organs). One might ask what else other than coercion is an operation that changes the target state's decision whom to choose as its representative?[82]

But again, it must be admitted that even this conclusion is theoretical, not yet confirmed by widespread practice and opinions, and it would be beneficial if the suggested interpretation of the element of coercion was confirmed by states. Hence, it is reflected in third recommendation in the next section.

One of the most approximate opinions that were publicly pronounced by representatives of states in this direction, is the one by the German representative in the 2021 Compendium:

> cyber activities targeting elections may be comparable in scale and effect to coercion if they aim at and result in a substantive disturbance or even permanent change of the political system of the targeted State, i.e. by significantly eroding public trust in a State's political organs and processes, by seriously impeding important State organs in the fulfilment of their functions or by dissuading significant groups of citizens from voting, thereby undermining the meaningfulness of an election.[83]

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[81] Schmitt, *supra* note 3, p. 51.

[82] In this regard, the understanding of coercive means expressed by Australia is particularly indicating: "Coercive means are those that effectively deprive or are intended to deprive the State of the ability to control, decide upon or govern matters of an inherently sovereign nature" (2021 Compendium, p. 5).

[83] *Ibidem*, p. 35.

Thereby, in the last part of the quoted paragraph above, the representative went as far as to accept that cyber operations leading to large portions of electorate not participating in the elections may be coercive, thus possibly fulfilling the elements of non-intervention. Whether the same would be accepted if the voters participated but voted differently, is however another matter and would also benefit from explanation by states.

4. LAW MAKING RECOMMENDATIONS

Taking into account three facts:

a. that even states discuss the principle of non-intervention as belonging among the most approximate rules of international law with the potential to regulate CETICs,
b. that interpretation of the elements of the principle contains significant shortcomings indicated above with regard its applicability to CETICs, and
c. that the number of CETICs keeps rising and states perceive them negatively and thus its international law-based regulation is desirable,

this section is dedicated to pointing out aspects of the principle of non-intervention that the interpretation and application of which would need to be updated to secure the suitability of the principle to CETICs. Thus, the following points may also be viewed as a sort of law-making recommendations that if followed would help to clarify the principle as a suitable option to regulate the CETICs. They are divided into five points, the first three being based upon the partial conclusions contained in previous section, and the last two serving as a confirmation of the interpretation of the principle specifically to CETICs.

As a preliminary matter, it should be stated that it would be beneficial if more states made their positions regarding their understanding of the principle public. The number of state representatives that expressed their views publicly remains limited.[84]

Thus, in those statements (as well as in practice), should states wish to reach a situation when the principle of non-intervention is applicable to CETICs, it would be beneficial if they (among others) in relation to the principle of non-intervention:

a. explicitly confirmed that the causal nexus between coercion and the desired effect may be indirect,
b. clarified that rather than methods used, the scale and reach of cyber operations are what defines them as coercive,
c. distinguished between overt state newsfeed and covert information operations that hide their source. The latter having the potential to be coercive due to its hidden nature,

[84] For example, only 15 states have publicly explained their positions in the 2021 Compendium.

d. explicitly confirmed that not only cyber tampering operations but also hack and release and information operations targeting electorate of another state in order to compel it to vote differently than they otherwise would, have the potential to coerce the target state and to violate the principle of non-intervention, and
e. invoked international responsibility of the intervening states in dispute settlement mechanisms for even CETICs.

To conclude the recommendations, it is clear that current international law has yet to keep up (at least from the perspective of the principle of non-intervention) with reality. While some may claim that adopting an international treaty that would encompass regulation of the CETICs via among others the principle of non-intervention would help to clarify the matter, it is submitted here that until customary international law is clarified satisfactorily in that regard, such a treaty would have small chances of success and might in fact prevent further development of customary law.

However, it should be kept in mind that this desired (at least by author of this article) applicability of the principle of non-intervention to CETICs is only one part of the large-scale discussions regarding the effects of dynamic changes upon the international community, caused by rapid technological development.

And so, it is commendable that states have commenced addressing the issue in the GGEs and OEWGs, as well as in other fora. One might only hope that this development will not be halted by the current state of international relations and the law will eventually catch with reality in this regard.

CONCLUSIONS

The article focuses on the issue of suitability of the principle of non-intervention to regulate cyber electorate targeting information operations, i.e., operations through which one state targets the electorate of another state before or during elections in the latter with the intent of changing the elections results.

Since the principle of non-intervention crystallized in pre-cyber age, the article identifies its "shortcomings" in this respect and suggests an "update" or clarification that states might consider in their practice and opinions, should they wish to secure the applicability of the principle to the operations in question.

The final conclusion may be summarized as follows: the principle's elements are not applied and interpreted in a way that would inherently prevent the applicability of the rule to CETICs. Nonetheless, in order to allow for it, it would still need to be clarified so that the law would positively reflect all elements needed for the applicability. These *clarifications* primarily concern the element of coercion that

is unsatisfactorily (or not in manner widespread and uniform enough) interpreted and applied in this regard in current international law. They include the need for an explicit confirmation that the causal nexus between nonforcible coercion and its desired effect may be indirect; that rather than methods used, the scale and reach of cyber operations are what defines them as coercive; and the confirmation of a distinction between overt state actions and covert information operations that hide their source.

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THE LONG-AWAITED BREAKTHROUGH LEGISLATION – CHANGES IN UKRAINIAN CRIMINAL LAW DUE TO THE RATIFICATION OF THE ROME STATUTE

Abstract: *Despite the fact that the Russian aggression against Ukraine has been ongoing since 2014, Ukrainian legislation establishing criminal responsibility for international crimes had not been fully in line with international standards for a long time. After many years of negotiations and overcoming many obstacles, the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 entered into force on 24 October 2024. This signifies that the Ukrainian material criminal law has introduced internationally recognised categories and elements of international crimes. In this article we analyse whether it is true that international standards regarding the elements of international crimes have been fully introduced, and to what extent the new legislation fulfils the goals of international criminal law – in particular, whether it sufficiently implements the standards established in the Rome Statute. This analysis indicates several elements that still could be improved in the area of Ukrainian material criminal law when it comes to the definitions of international crimes.*

Keywords: International Criminal Court, international criminal law, crimes against humanity, criminal law of Ukraine, command responsibility

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INTRODUCTION

Despite the fact that the Russian aggression against Ukraine has been ongoing since 2014, Ukrainian legislation on responsibility for international crimes had not been fully in line with international standards for a long time. Firstly, the part of the Criminal Code of Ukraine (CCU) which penalises crimes against peace, security and international order (Chapter XX) did not contain a detailed (or complete in the light of international standards) list of types of international crimes corresponding to the catalogue of crimes in the Rome Statute, thus hindering the correct qualification and prosecution of such crimes.[1] As a consequence, the legislation on international crimes was not coherent and not in compliance with international law. It was not merely an academic problem, but a practical one that led to the impossibility of prosecuting the perpetrators of the most serious violations of international law. In particular, the problem concerned the fact that there was no category or definition of crimes against humanity in the CCU; it was not possible to prosecute perpetrators for crimes against humanity – neither on the basis of national law nor (hypothetically) of international law.[2] The criminal offences committed after the Russian aggression could only be legally classified as war crimes or the crime of genocide. Moreover, other existing provisions lacked specificity in their approach to the precise elements of international crimes: the provision penalising violations of the laws and customs of war (Art. 438 CCU) was a blanket norm, as it only directly listed a few specific violations of international humanitarian law, whereas for the remaining crimes it simply referred to those violations prescribed in the treaties ratified by Ukraine.[3] In consequence, only the violations of the laws and customs of war enumerated in international instruments

[1] *See* A. Kosylo, A. Dmytriv, *Implementation and Interpretation of the Definitions of International Crimes in the National Jurisdiction of Ukraine*, 43 Polish Yearbook of International Law 353 (2024); I. Marchuk, *Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine*, Torkel Opsahl Academic EPublisher, The Hague: 2018, p. 393; I. Anosova, K. Aksamitowska, V. Sancin, *Positive Complementarity in Action: International Criminal Justice and the Ongoing Armed Conflict in Ukraine*, 24 International Criminal Law Review 657 (2024); K. Aksamitowska, *The Domestic Legal Framework for the Prosecution of Core International Crimes in Iraq and the Ukraine: A Comparative Perspective*, in: P. Grzebyk (ed.), *International Crimes in National Regulations of Selected States*, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, Warszawa: 2023, pp. 229–244. On the participation of civil society in this procedure, *see* K. Aksamitowska, *The Counter-Hegemonic Turn to "Entrepreneurial Justice" in International Criminal Investigations and Prosecutions Relating to the Crimes Committed in Syria and Eastern Ukraine*, in: F. Jeßberger, L. Steinl, K. Mehta (eds.), *International Criminal Law: A Counter-Hegemonic Project?*, TMC Asser Press, Hague: 2022, p. 142.

[2] Кримінальний кодекс України [Criminal Code of Ukraine], No. 2341-III of 5 April 2001, available at: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text (accessed 30 June 2025).

[3] *The Domestic Implementation of International Humanitarian Law in Ukraine (updated)*, Global Rights Compliance, Kyiv: 2021, available at: https://www.asser.nl/media/794633/2021-the-domestic-implementation-of-ihl-in-ukraine-updated.pdf (accessed 30 June 2025).

duly ratified by Ukraine could be prosecuted on the basis of Ukrainian criminal law. Thus, some legal scholars claimed that other war crimes, e.g. those established in customary international law or some of those listed in the Rome Statute, fell outside the ambit of Ukrainian national law.[4]

Secondly, the implementation of international criminal law could not be considered to be in accordance with the standards of international law, as the Rome Statute had not been ratified by Ukraine. Although Ukraine signed the Rome Statute on 20 January 2000, the ratification was not executed for years, until 21 August 2024; on 1 January 2025, it entered into force for Ukraine.[5] There were many obstacles to overcome to make ratification possible. First, in 2001 the Constitutional Court ruled that the International Criminal Court (ICC)'s principle of complementarity conflicted with the Ukrainian Constitution (its Art. 124).[6] The Constitutional Court found that a potential ICC investigation into crimes committed on the territory of Ukraine would be contrary to the constitutional provision which conferred exclusive competence in matters of the judiciary to the Ukrainian national courts.[7] To address this problem, amendments pertaining to Art. 124 of the Constitution were introduced, in order to allow for the jurisdiction of the ICC to be applicable to Ukraine in the event of the Rome Statute being ratified. They entered into force in 2019, three years after the official publication of the law.[8] However, even in this situation, the government did not immediately move towards ratification of the ICC Statute, which finally took place on 21 August 2024.[9]

In this text we analyse the new provisions of the CCU, resulting from the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 (Law No. 4012-IX or the

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[4] I. Marchuk, A. Wanigasuriya, *Venturing East: The Involvement of the International Criminal Court in Post-Soviet Countries and Its Impact on Domestic Processes*, 44(3) Fordham International Law Journal 735 (2021), p. 747.

[5] Закон України «Про ратифікацію Римського статуту Міжнародного кримінального суду та поправок до нього» [The Law of Ukraine on the ratification of the Rome Statute of the International Criminal Court and its amendments], No. 3909-IX of 21 August 2024, available at: https://zakon.rada.gov.ua/laws/show/3909-20#n2 (accessed 30 June 2025).

[6] Висновок Конституційного Суду України [Opinion of the Constitutional Court of Ukraine], 11 July 2001, N 1-35/2001, available at: https://zakon.rada.gov.ua/laws/show/v003v710-01#Text (accessed 30 June 2025).

[7] M. Kersten, *After All This Time. Why has Ukraine Not Ratified the Rome Statute of the International Criminal Court?* 2022, Justice in Conflict, 14 March 2022, available at: https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court/; G. Radu, *Is Ukraine Finally Breaking Its 24-year International Criminal Court Commitment Phobia?*, Asser Institute Blog, available at: https://rb.gy/8788mr (both accessed 30 June 2025).

[8] Marchuk, *supra* note 1, p. 379.

[9] Marchuk, Wanigasuriya, *supra* note 4, pp. 745–746.

Law of 9 October 2024),[10] and whether it is a valid assumption that this act fully introduced international standards regarding the elements of international crimes and to what extent the new legislation fulfils the goals of international criminal law, in particular whether it implements in a sufficient way the standards established in the Rome Statute.

The first part of the article presents the attempts to criminalise all four types of international crimes in the CCU and the reasons why they were unsuccessful. In the second part the new legislation is analysed, allowing for a comprehensive analysis of its alignment with international standards and the consequences of the new wording of the regulations. This analysis indicates several elements that could still be improved in the area of Ukrainian material criminal law when it comes to the definitions of international crimes.

1. ON THE ROCKY PATH TO NEW LEGISLATION ON INTERNATIONAL CRIMES

The war began in 2014 and Ukrainian law was not fully adapted to allow for effective prosecution and adjudication of international crimes following the Russian Federation's aggression in 2014; moreover, it failed to comply with international law. In consequence, the powers of Ukrainian law enforcement authorities in terms of legally qualifying conduct remained unchanged.[11] At the same time, it did not mean that international law is not applied at all – in their jurisprudence, national courts have applied the case law of the European Court of Human Rights (ECtHR) and have referred to the Geneva Conventions in cases concerning war crimes.[12] In particular, while defining the status of Russian aggression, courts have referred to it as an international armed conflict. In doing so, the courts have invoked, inter alia, the Charter of the United Nations, UN resolutions and the Declaration of the United Nations General Assembly on the inadmissibility of intervention and

[10] Закон України «Про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв'язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього» [The Law of Ukraine on amendments to the Criminal and the Criminal procedure codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments], No. 4012-IX of 9 October 2024, available at: https://zakon.rada.gov.ua/laws/show/4012-20#n6 (accessed 30 June 2025).

[11] *Human Rights Defenders Recommend the Ukrainian Authorities to Finilize the Draft Law No. 7290*, Zmina, 22 April 2022, available at: https://tinyurl.com/3r56capz; *MATRA-Ukraine: The Halfway Mark*, TMC Asser Institute & Global Rights Compliance, 22 September 2022, available at: https://www.asser.nl/matra-ukraine/news-and-events/matra-ukraine-the-halfway-mark/ (both accessed 30 June 2025).

[12] *See also* A. Korynevych, O. Senatorova, M. Shepitko, *Prosecution of the Crime of Aggression in International and Ukrainian Jurisdiction: Challenges and Prospects*, 43 Polish Yearbook of International Law 367 (2024), pp. 377–378.

interference in the internal affairs of states.[13] Court decisions have concluded that the conflict between the Russian Federation and Ukraine is an ongoing international armed conflict. References have been made to the four 1949 Geneva Conventions. Moreover, Ukrainian courts have referred to the Rome Statute in their decisions, although Ukraine had not ratified it at the time when decisions were issued. The relevant provisions of the Rome Statute have been used to determine which acts should be classified as war crimes or in order to interpret such acts. The case law of international criminal courts, i.e. the International Criminal Tribunal for former Yugoslavia, has also been cited by Ukrainian courts for the interpretation of international crimes.[14]

The lacuna in the penalisation of international crimes was clearly visible, and in 2021 the Ukrainian Parliament adopted Bill No. 2689, defining the categories of war crimes and crimes against humanity, defining them in accordance with the international humanitarian law and the Rome Statute and providing for a new structure of command responsibility.[15] In particular, Art. 442-1 of the Bill penalises crimes against humanity.[16] The draft law accommodated major developments of international law, in particular, taking into account the wording and scope of

[13] Charter of the United Nations (signed on 26 June 1945); Declaration No. 36/103 of the United Nations General Assembly of 9 December 1981, on the inadmissibility of intervention and interference in the internal affairs of states; UNGA resolutions: of 21 December 1965, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, A/RES/20/2131; of 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, A/RES/2625(XXV); of 16 December 1970, *Declaration on the Strengthening of International Security*, A/RES/25/2734; of 14 December 1974, *Definition of Aggression*, A/RES/3314(XXIX).

[14] Вирок Чернігівського районного суду Чернігівської області [Decision of Chernihiv District Court of Chernihiv Region] of 10 January 2023, Case No. 748/2272/22, available at: https://reyestr.court.gov.ua/Review/108302451; Вирок Деснянського районного суду м. Чернігова [Decision of the Desnyan District Court of Chernihiv] of 11 April 2023 No. 750/6470/22, available at: https://reyestr.court.gov.ua/Review/110135338; Вирок Іванківського районного суду Київської області [Decision of the Ivankiv District Court of the Kyiv Region] of 28 June 2023, No. 366/869/23, available at: https://reyestr.court.gov.ua/Review/111894270; Вирок Саксаганського районного суду м. Кривого Рогу [Decision of the Saksagan District Court of Kryvyi Rih] of 10 October 2023, No. 522/3868/23, available at: https://reyestr.court.gov.ua/Review/111894270 (all accessed 30 June 2025).

[15] *Parliament of Ukraine Adopts Bill to Implement International Criminal and Humanitarian Law*, Parliamentarians for Global Action, 20 May 2021, available at: https://www.pgaction.org/news/ukraine-bill-2689.html (accessed 30 June 2025).

[16] Comparative Table to the Draft Law of Ukraine "On amendments to certain legislative acts on the enforcement of international criminal and humanitarian law" (on amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the implementation of the norms of international criminal and humanitarian law), Bill No. 2689, available at: https://www.pgaction.org/pdf/2021/en-bill-2689-10-03-2021.pdf (accessed 30 June 2025).

international crimes in the Rome Statute.[17] However, the Bill was not signed by the president and did not enter into force.[18]

Later, a new draft law was presented: Bill No. 7290 (on 15 April 2022, the Verkhovna Rada of Ukraine registered the Draft Law "On amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine").[19] However, it was met with severe criticism.[20] It was claimed that the planned changes "artificially reduced opportunities to prosecute Russian military commanders and civilian superiors liable for war crimes", by not taking into account the existing international standards of command responsibility and not penalising the inaction of a commander for their subordinates' infringement of international norms. Moreover, the draft proposed to punish military commanders with deprivation of liberty for a period ranging from 7 to 10 years, although subordinates could be imprisoned for longer, while under international law the punishment for the inaction of commanders and superiors should be no less than that of their subordinates.

Moreover, experts and human rights specialists pointed out that unlike Bill No. 2689, Bill No. 7290 did not contain a provision on universal jurisdiction, according to which Ukraine could prosecute international crimes regardless of the place of their commission and the citizenship of the perpetrator.[21] The Bill did not indicate the leadership character of the crime of aggression, although the international standard provides that only military and political leaders of the state can be held responsible for the crime of aggression. As a result, it signifies that each Russian prisoner of war could be prosecuted for having committed the crime of

[17] Marchuk, Wanigasuriya, *supra* note 4, pp. 747–749.

[18] M. O'Brien, *Options for a Peace Settlement for Ukraine: Option Paper XVI – War Crimes, Crimes against Humanity and Genocide*, Opinio Juris, 30 October 2022, available at: http://opiniojuris.org/2022/10/30/options-for-a-peace-settlement-for-ukraine-option-paper-xvi-war-crimes-crimes-against-humanity-and-genocide/; K. Ambos, *Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?*, EJIL: Talk!, 10 June 2022, available at: https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/ (both accessed 30 June 2025).

[19] Проект Закону про внесення змін до Кримінального кодексу України та Кримінального процесуального кодексу України [The Draft Law On making changes to the Criminal Code of Ukraine and Code of Criminal Procedure of Ukraine] of 14 April 2022, available at: https://itd.rada.gov.ua/billInfo/Bills/pubFile/1271913 (accessed 30 June 2025).

[20] *See Euromaidan SOS: a New Government Bill No. 7290 Artificially Reduces Opportunities to Prosecute Russian Military Commanders and Civilian Superiors Liable for War Crimes*, Center for Civil Liberties, 20 April 2022, available at: https://ccl.org.ua/en/claims/euromaidan-sos-a-new-government-bill-№-7290-artificially-reduces-opportunities-to-prosecute-russian-military-commanders-and-civilian-superiors-liable-for-war-crimes/; *Principle of Complementarity: International Justice in Ukraine*, Ukrainian Legal Advisory Group, Kyiv: 2020, p. 21, available at: https://ulag.org.ua/wp-content/uploads/2024/09/PRINCIPLE-OF-COMPLEMENTARITY-1.pdf (both accessed 30 June 2025).

[21] *See also Principle of Complementarity...*, *supra* note 20, p. 4; C. De Vos, *Destruction and Devastation: One Year of Russia's Assault on Ukraine's Health Care System*, Physicians for Human Rights, 21 February 2023, available at: https://phr.org/our-work/resources/russias-assault-on-ukraines-health-care-system/ (accessed 30 June 2025).

aggression. Moreover, it was criticised that, contrary to draft Bill No. 2689, draft Bill No. 7290 did not contain a rule indicating the need to consider international law while applying Ukrainian legislation to international crimes.

While the fate of the new legislation was at stake, the question was being explored whether prosecution for crimes against humanity would be possible on the basis of international or customary law.[22] When it comes to customary law, Art. 58 of the Ukrainian Constitution of 1996 states that "[n]o-one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence." There is no clear basis, however, to argue that the penalisation of all types of crimes against humanity could be derived from customary international law (*jus cogens*) norms.[23]

When it comes to using international treaties as material criminal law norms on which prosecution could be based, hypothetically, there is a possibility to prosecute some of the behaviours falling within the scope of crimes against humanity. Some types of offences that could be classified as crimes against humanity are covered by international treaties. In this scope, since according to Art. 9 of the Constitution of Ukraine "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine", international treaties theoretically could become legal acts on which prosecution could be based. On 14 August 2015, Ukraine became a state party to the Convention for the Protection of All Persons from Enforced Disappearance,[24] whose Art. 5 stipulates the following: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law." On 10 November 1975, Ukraine (the Ukrainian Soviet Socialist Republic at that time) also ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid, which declares that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes that violate the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constitute a serious threat to international peace and security.[25] Ukraine (the Ukrainian Soviet Socialist Repub-

[22] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Wolters Kluwer, Hague: 1999, p. 210.

[23] This is unlike in the case of the Polish Constitution, which in Art. 42(2) provides that "[o]nly a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law", giving a foundation for arguing that prosecution on the basis of *jus cogens* is possible.

[24] Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010), 2716 UNTS 3.

[25] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted on 30 November 1973, entered into force on 18 July 1976), 1015 UNTS 243.

lic) also ratified the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, on 19 June 1969.[26]

However, prosecuting crimes on the basis of international law poses serious questions about the principle of *nullum crimen sine lege certa/scripta* and has no precedence in the practice of Ukrainian courts.[27] One may also examine the possibility of applying the norm resulting from Art. 7 of the Rome Statute, since Ukraine ratified that treaty. It previously expressed its support for the definition, by recognising the jurisdiction of the ICC over crimes against humanity committed on its territory since 21 November 2013. Also, now that the new national legislation is in place, the question remains whether it is admissible to search for elements of crimes in international treaties (especially in the case of war crimes) – also in order to clarify specific notions of international law.

Once the Law of 9 October 2024 entered into force, establishing the definition of crimes against humanity, it must be determined whether it is possible to retroactively apply Art. 442-1 CCU to actions that took place before 24 October 2024 (when it entered into force). It should be done in accordance with the Ukrainian Constitution and the interpretation adopted in the case law of the Ukrainian Constitutional Court. In its previous jurisprudence, the Constitutional Court already assessed the possibility of retroactively applying criminal law. In particular, the Constitutional Court expressed two positions. Firstly, the provisions of Art. 58 of the Constitution of Ukraine, taking into account the requirements of Art. 92(1)(22) of the Constitution of Ukraine, should be understood in such a way that the laws of Ukraine alone determine which acts are crimes and establish criminal liability for their commission. Such laws have retroactive effect in cases where they mitigate or cancel the criminal liability of a person. Secondly, the provisions of Art. 6(2) CCU should be understood in such a way that only laws which cancel or mitigate the criminal liability of a person have retroactive effect in time.[28]

On the other hand, it seems that the provisions of Art. 58 of the Constitution of Ukraine could be examined differently from the point of view of criminal liability for international crimes, which include crimes against humanity. The possibility

[26] Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968, entry into force on 11 November 1970), 754 UNTS 73. *See also Ukraine*, Equipo Nizkor, https://www.derechos.org/intlaw/ukr.html (accessed 30 June 2025).

[27] The principle of *nullum crimen sine lege* is enshrined in Ukrainian law in Art. 58 of the Constitution of Ukraine and in Arts. 1–4 CCU.

[28] Рішення Конституційного Суду України [Decision of the Constitutional Court of Ukraine (case on the retroactive effect of the criminal law in time)] of 11 April 2000, N 6-rp/2000 у справі за конституційним поданням 46 народних депутатів України щодо офіційного тлумачення положень статті 58 Конституції України, статей 6, 81 Кримінального кодексу України (справа про зворотну дію кримінального закону в часі), справа N 1-3/2000, available at: https://zakon.rada.gov.ua/laws/show/v006p710-00#Text (accessed 30 June 2025).

of prosecuting earlier conduct on the basis of this provision with retroactive effect may be assessed in the light of Art. 7(2) of the European Convention on Human Rights (ECHR), for example, according to which the principle of *nullum crimen sine lege* shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.[29] In particular, the possibility of prosecuting international crimes on the basis of a new law was confirmed by the ECtHR in *Streletz, Kessler and Krenz v. Germany*.[30] In turn, in *Kononov v. Latvia*,[31] the Court stated that it was possible to foresee that the impugned acts constituted war crimes, and to anticipate that perpetrators of such acts would be subsequently prosecuted. Even in cases where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused person guilty, fix the punishment on the basis of domestic criminal law. There can be no doubt that even in the absence of an international treaty prohibiting crimes against humanity, at least since the Nuremberg judgment, any person should anticipate the criminalisation of crimes which are internationally recognised as such.[32]

2. ADOPTION OF THE NEW LAW AND ITS CONSEQUENCES

On 24 October 2024, the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 entered into force. This law was not adopted on the basis of any of the above-mentioned Bills, but as a consequence of proceedings over Bill No. 11484, which was a draft presented by the President of Ukraine.[33]

[29] The Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 195), 213 UNTS 221.

[30] ECtHR, *Streletz, Kessler and Krenz v. Germany* (App. Nos 34044/96, 35532/97 and 44801/98), 22 March 2001. *See also* the literature on the concept of the objective foreseeability of international law norms of a criminal character: S. Paiusco, *Nullum Crimen Sine Lege, the European Convention on Human Rights and the Foreseeability of the Law*, Nomos, Hamburg: 2020, pp. 111–118; A. Rychlewska, *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, 34 Polish Yearbook of International Law 163 (2016); M. Pieszczek, *Zasada lex retro non agit w kontekście zbrodni wojennych – rozważania na tle orzeczeń ETPCz w sprawie Kononov v. Łotwa* [The Principle of *Lex Retro Non Agit* in the Context of War Crimes: A Few Comments on the Case of *Kononov v. Latvia*], 6 Europejski Przegląd Sądowy 14 (2011); C. Peristeridou, *The Principle of Legality in European Criminal Law*, Intersentia, Cambridge: 2015, pp. 99–100.

[31] ECtHR, *Kononov v. Latvia* (App. No. 36376/04), 17 May 2010.

[32] *See also* O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, CH Beck, München: 2008, p. 167 and the state practice and jurisprudence cited therein.

[33] Проект Закону про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв'язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього [Draft Law on amendments to the Criminal and Criminal Procedure Codes of

The Law of 9 October 2024 introduced significant changes to Ukrainian legislation regarding responsibility for international crimes,[34] including:

- a new category of international crime, "crimes against humanity", with its definition and responsibility for it;
- specification of the concept of universal jurisdiction;
- criminal responsibility for civilian superiors and military commanders in cases where their subordinates commit international crimes;
- harmonisation of legislative terminology with that used in the Rome Statute.

It must be noted that these were not the only changes introduced into the CCU since 22 February 2022. Several changes were also introduced by Act No. 2124-IX of 15 March 2022 "On the introduction of amendments to the Criminal Code of Ukraine and other statutory acts of Ukraine concerning the determination of circumstances that exclude the punishability of an offence and ensuring combat immunity during martial law", which became effective on 21 March 2022.[35] This Act includes the list of circumstances that exclude punishability of an offence if it is executed in the course of performing one's duty to defend the homeland and the independence and territorial integrity of Ukraine.[36] Another amendment to the general part of the Code was introduced by Act No. 2472-IX of 28 July 2022 "On amendments to the Criminal Code, the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on the regulation of the procedure of exchange of persons as prisoners of war."[37] Pursuant to the new provisions, new grounds were introduced for releasing a convict from serving their sentence under a decision of an authorised authority in order to exchange the convict as a prisoner of war. Also,

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Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and amendments thereto], No. 11484 of 15 August 2024, available at: https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=11484&conv=9 (accessed 30 June 2025).

[34] *See* Kosylo, Dmytriv, *supra* note 1, pp. 353–365.

[35] Закон України «Про внесення змін до Кримінального кодексу України та інших законодавчих актів України щодо визначення обставин, що виключають кримінальну протиправність діяння та забезпечують бойовий імунітет в умовах дії воєнного стану» [Law of Ukraine on amendments to the Criminal Code of Ukraine and other legislative acts of Ukraine regarding the determination of circumstances excluding the criminal illegality of an act and ensuring combat immunity in the conditions of martial law], No. 2124-IX of 15 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2124-20#Text (accessed 30 June 2025).

[36] These changes were described in detail – *see* M. Mozgawa, M. Shupyana, *Changes in the Ukrainian Criminal Code Related to the Ongoing War with the Russian Federation*, 33(3) Studia Iuridica Lublinensia 111 (2024).

[37] Закон України «Про внесення змін до Кримінального, Кримінального процесуального кодексів України та інших законодавчих актів України щодо врегулювання процедури обміну осіб як військовополонених» [Law of Ukraine on amendments to the Criminal and Criminal Procedural Codes of Ukraine and other legislative acts of Ukraine on regulating the procedure for the exchange of persons as prisoners of war], No. 2472-IX of 28 July 2022, available at: https://zakon.rada.gov.ua/laws/show/2472-20#Text (accessed 30 June 2025).

according to Act No. 2108-IX of 3 March 2022 "On making changes to some legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activity",[38] Chapter I of the special part of the CCU was supplemented with the new Art. 111^1, which provides for liability for collaborating with the enemy. Moreover, Act No. 2110-IX supplemented Chapter XX of the special part of the CCU with Art. 436^2, which introduces criminal liability for justifying, considering as lawful and denying the fact of the Russian Federation's armed aggression against Ukraine.[39]

Although these new provisions do not relate directly to international crimes as formulated in the Rome Statute, they may exert influence on the exercise of the new provisions regarding international crimes as penalised in Chapter XX CCU. They may become mitigating or aggravating circumstances, or new types of crimes connected to forbidden means and methods of warfare.

3. CRIMES AGAINST HUMANITY

According to the recent amendments to the CCU, the legislation now includes the definition and legal responsibility for crimes against humanity. The newly adopted Art. 442-1 CCU provides a definition of this type of crime that closely aligns with the wording of the Rome Statute. Specifically, it is defined as intentional actions committed as part of a widespread or systematic attack directed against a civilian population. Such acts include (1) persecuting any identifiable group or collectivity, i.e. restricting human rights based on political, racial, national, ethnic, cultural, religious, sexual or other grounds of discrimination recognised as impermissible under international law; (2) deporting a population, i.e. the forced displacement (eviction), without the grounds provided for by international law, of a relevant group of persons from a territory in which they were lawfully present to the territory of another state; (3) forcibly transferring a population, i.e. the forced displacement (eviction), without the grounds provided for by international law, of a relevant group of persons from a territory in which they were lawfully present to another territory within the borders of the same state; (4) perpetrating rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form

[38] Закон України «Про внесення змін до деяких законодавчих актів України щодо встановлення кримінальної відповідальності за колабораційну діяльність» [Law of Ukraine on amendments to certain legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activities], No. 2108-IX of 3 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2108-20#Text (accessed 30 June 2025).

[39] Закон України «Про внесення змін до деяких законодавчих актів України щодо посилення кримінальної відповідальності за виготовлення та поширення забороненої інформаційної продукції» [Law of Ukraine on amendments to certain legislative acts of Ukraine regarding strengthening criminal liability for the production and distribution of prohibited information products], No. 2110-IX of 3 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2110-ix#Text (accessed 30 June 2025).

of sexual violence; (5) enslaving persons or trafficking in humans; (6) carrying out enforced disappearance; or (7) illegally depriving persons of liberty or engaging in torture and other inhumane acts which cause extreme suffering, serious physical or mental harm or severe bodily injury.

The commission of such acts is punishable by imprisonment for a period ranging from 7 to 15 years. If these crimes escalate to the level of apartheid, mass extermination or murder, the penalty increases to 10 to 15 years of imprisonment or even life imprisonment. Additionally, specific definitions have been provided to clarify key terms:

- an "attack directed against a civilian population" refers to a course of conduct involving the multiple commission (two or more instances) of any of the acts referred to in this article against a civilian population, pursuant to or in furtherance of a state or organisational policy to commit such an attack;
- "enforced disappearance" entails the arrest detention, abduction or any other form of deprivation of liberty of a person followed by a refusal to acknowledge the fact of such arrest, detention, abduction or deprivation of liberty in any other form or with the concealment of information about the fate or whereabouts of such a person;
- the "crime of apartheid" is defined according to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;
- "extermination" involves the taking of the life of one or more persons by deliberately inflicting conditions of life intended to destroy part of the population, including by depriving them of access to water, food or medicine;
- "torture" refers to the intentional infliction of severe pain or suffering upon an individual, whether physical or psychological.

It is clear from the wording of this provision that the framework of the Rome Statute was adopted in order to structure the elements of this type of crime. The significance of the "widespread and systematic character" of an attack was appropriately noted. The new Law of 9 October 2024 emphasises the scope or gravity of this act, as does the ICC Statute. It also introduces the most internationally recognised element of this definition, that the act in question must be directed against a "civilian population".[40] There are, however, several details that differ from the wording of the Rome Statute. Firstly, in the chapeau of this article the phrase "with knowledge of the attack" is missing, constituting a *mens rea* element of crime. It can be claimed, however, that the general part of the Criminal Code makes this requirement so clear that it was not necessary to repeat this element in the text of

[40] *See e.g.* Triffterer, *supra* note 32, pp. 180–181; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, pp. 152–153.

the article. Knowledge about all the elements of a crime is a required standard of intent in Ukrainian criminal law.

Also, the type of crime has been split into two parts: the more severely punished "intentional acts committed as part of a widespread or systematic attack directed against any civilian population constituting apartheid, extermination or murder" – which are punishable by imprisonment for a term of 10 to 15 years or life imprisonment – and the other, less severely punished acts constituting offences, which are punishable by imprisonment for a term of 7 to 15 years. It seems that this differentiation is not justified in the light of the Rome Statute, which gives the powers to assess the real severity of the crime and due penalty to the adjudicating judges, who on the basis of Art. 78 of the Rome Statute, should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person when determining the sentence (taking into consideration that committing several acts of murder could be assessed as less severe than one hundred thousand instances of rape, deportation or torture). For all the crimes under the jurisdiction of the ICC, the judges may pronounce sentences such as imprisonment for a specified number of years, which may not exceed a maximum of 30 years or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[41] It does not signify that states should copy these solutions (especially that the ICC adjudicates only in the gravest cases of violations of international criminal law), but they certainly should take into consideration the special gravity of such crimes when compared to other criminal offences.

The third detail that differs in the CCU refers to a change of concepts: in the Criminal Code the forbidden conduct is "persecution against any identifiable group or collectivity, meaning restrictions on human rights based on political, racial, national, ethnic, cultural, religious, sexual or other grounds marks of discrimination recognised as impermissible under international law." However, under Art. 7 of the Rome Statute, a crime against humanity is, inter alia, an act of "persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". According to paragraph 3, "for the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above";

[41] The extreme gravity of crimes against humanity (and genocide) was underlined in the case of the *ad hoc* tribunals, as in the case of *Prosecutor v. Kambanda*, case no. ICTR 9-23-S, judgment and sentence, para. 14; *see* Triffterer, *supra* note 32, p. 1436.

the wording of this definition is not without meaning, as it was achieved through a process of long negotiations.[42] Therefore, in accordance with the standard of protection as it has been set in international law, persecution on "gender grounds" is forbidden.

4. UNIVERSAL JURISDICTION

Before the amendments introduced by the Law of 9 October 2024, the principle of universal jurisdiction in Ukrainian criminal law existed in a somewhat limited and unclear form. Art. 8(1) CCU provides that foreign nationals or stateless persons not residing permanently in Ukraine who have committed criminal offences outside Ukraine shall be criminally liable in Ukraine under this Code in such cases as provided for by international treaties, or if they have committed any of the grave or special grave offences against the rights and freedoms of Ukrainian citizens or Ukraine as prescribed by the Code.[43] This provision introduces the jurisdiction of Ukrainian courts on the basis of both the principle of universal jurisdiction ("as provided for by the international treaties") and the principle of passive jurisdiction (where Ukrainian citizens are victims or Ukrainian interests are violated). However, it was impossible to claim that prosecution on the basis of the principle of universal jurisdiction was operational in Ukraine, as the principle of *nullum crimen sine lege* forbids the prosecution of offences that are not defined in national law (as in the case of crimes against humanity).

This provision was not changed, but paragraph 2 was added and the previous paragraph 2 became paragraph 3 of this provision (see the table below). The present Art. 8(2) reads as follows:

> Foreign nationals or stateless persons who do not permanently reside in Ukraine and who have committed any of the crimes provided for in Articles 437–439, 442, and 442[1] of this Code outside Ukraine shall be subject to criminal responsibility in Ukraine under this Code, regardless of the conditions specified in Part 1 of this Article, if such

[42] Triffterer, *supra* note 32, p. 273. On the procedure of negotiations of the text of Art. 7(3) of the Rome Statute, *see* V. Oosterveld, *The Defnition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal 55 (2005), pp. 58–66.

[43] *See e.g.* M. Pashkovsky, *Окремі аспекти регламентації інституту юрисдикції в міжнародному праві* [Certain Aspects of the Regulation of the Institution of Jurisdiction in International Law], in: V.M. Dryomin (ed.), *Правове життя сучасної України : матер. Міжнар. наук. конф. проф.-викл. складу (Одеса, 20–21 квітня 2012 р.)* [Legal Life of Modern Ukraine: Proceedings of the International Scientific Conference of the Teaching Staff (Odessa, April 20–21, 2012)], Fenix, Odessa: 2012, pp. 336–338; M. Pashkovsky, *Universal Criminal Jurisdiction in Ukraine*, Institute For War & Peace Reporting, 20 September 2022, available at: https://iwpr.net/global-voices/universal-criminal-jurisdiction-ukraine (accessed 30 June 2025).

> persons are present in the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused.

This new provision provides a detailed basis for the universal jurisdiction principle in cases of crimes of aggression (Art. 437), war crimes (Art. 438), use of weapons of mass destruction (Art. 439), genocide (Art. 442) and crimes against humanity (Art. 442[1]). The necessary conditions for Ukrainian courts to apply universal jurisdiction are (1) the existence of an international agreement under which Ukraine has undertaken to prosecute a specific crime – an example of such an agreement is the Statute of the ICC; (2) it has not been decided to extradite the foreigner – however, prosecution is possible when a foreign state has requested extradition and the application has been denied or when no such application has been filed; and (3) the perpetrator is on the territory of Ukraine.

Universal jurisdiction means the competence of national courts to try perpetrators of crimes committed outside the territory of that state and having no connection with that state, whether because of the nationality of the perpetrator or the injured party or a violation of the specific interests of that state.[44] It is an obligation to engage its own law enforcement apparatus in preventing impunity for perpetrators of specific treaty crimes.[45] It is generally accepted that some crimes are so harmful to the entire international community – and therefore to all states involved in its functioning – that bringing the perpetrators to justice, regardless of the location of the crime, should be the duty of every state.[46] Universal jurisdiction offers enormous potential for expanding the effectiveness and reach of international criminal law and allows states to take an active part in preventing impunity for the most serious crimes. Active involvement of the state apparatus in prosecuting such crimes means not consenting to impunity or to violations of the principle of coexistence established by the international community. It was rightly observed that the introduction of precise foundations for universal jurisdiction would be an important

[44] *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation: Chapter 14. Overcoming Obstacles to Implementing Universal Jurisdiction*, Amnesty International, 31 August 2001, p. 11, available at: https://www.amnesty.org/en/documents/ior53/017/2001/en/ (accessed 30 June 2025).

[45] A. O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony*, Routledge, New York: 2017, p. 94; A. Poels, *Universal Jurisdiction in Absentia*, 23(1) Netherlands Quarterly of Human Rights 65 (2005); R. Rabinovitch, *Universal Jurisdiction in absentia*, 28(2) Fordham International Law Journal 500 (2005); M. El Zeidy, *Universal Jurisdiction in absentia: Is It a Legal Valid Option*, (37) International Lawyer 835 (2003), pp. 852–854.

[46] M. Robinson, *Forward to the Princeton Principles of Universal Jurisdiction*, Equipo Nizkor, July 2001, available at: https://www.derechos.org/nizkor/icc/princeton.html (accessed 30 June 2025); L. Reydams, *Universal Jurisdiction: International and National Perspectives*, Oxford University Press, Oxford: 2003, p. 223.

sign of Ukraine's readiness to assist other states in the prosecution of international crimes committed outside its territory.[47]

In this case, two problems appear. Firstly, the Code makes a reference to provisions of national law: universal jurisdiction should be applied in cases of "crimes provided for in Articles 437–439, 442, and 442[1] of this Code." At the same time, the obligation to exercise universal jurisdiction is based on international treaties. There is no doubt that the obligation to prosecute must in this case result from an international treaty and not solely from domestic provisions. Secondly, the provision introduces conditional universal jurisdiction, in that the perpetrator must be on the territory of Ukraine. The provision makes it clear that the principle of universal jurisdiction can be used only "if such persons are present on the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused."

This solution of the Ukrainian legislature seems to be unduly limited. The aim of universal jurisdiction is to prevent impunity for perpetrators of the most serious crimes, and from this perspective it should be assumed that the obligation to prosecute, on the basis of universal jurisdiction, perpetrators who are *not* on the territory of the given state not only results from international obligations, but also has a significant preventive and condemnatory effect.[48] Many states consider the introduction of a mechanism according to which it is possible to request the extradition of a suspect for international crimes who is not on the territory of the country in question to be one of the key achievements in preventing impunity – this was done in Germany, Belgium and Lithuania, for example.[49] Ukraine has placed itself in the group of states that demand the presence of the perpetrator in order to initiate criminal prosecution. It should be stressed that changes in many states' national legislation are rather moving in the opposite direction, where unconditional universal jurisdiction is being considered in order to also prosecute crimes committed in Ukraine by Russian perpetrators (e.g. Poland[50]).

[47] *See Euromaidan SOS...*, *supra* note 20.

[48] *See* Poels, *supra* note 45. *See also* T. Ostropolski, *Zasada. jurysdykcji uniwersalnej w prawie międzynarodowym* [The principle of universal jurisdiction in international law], EuroPrawo, Warszawa: 2008, pp. 45–47.

[49] *Universal Jurisdiction Annual Review 2024*, Trial International, Geneva: available at: https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (accessed 30 June 2025).

[50] *See* the draft bill of the Ministry of Justice of Poland – *Projekty aktów prawnych* [Draft Legal Acts], gov.pl, 17 April 2024, available at: https://www.gov.pl/web/sprawiedliwosc/projekty-aktow-prawnych (accessed 30 June 2025).

5. COMMAND RESPONSIBILITY

Art. 31.1 CCU establishes the criminal liability of military commanders, persons effectively acting as military commanders and other superiors for crimes committed by their subordinates if they fail to exercise proper control. Under the aforementioned article, a military commander or a person effectively acting as a military commander is criminally liable for the crimes specified in Arts. 437–439, 442, and 442-1 of the CCU if they were committed by a subordinate under their effective command and control. Liability arises if the commander knew, should have known or could have known about the crime or the subordinate's intention to commit it but failed to take necessary measures to prevent, repress or report it to the competent authority. In addition, other superiors who are not military commanders but hold authority and control over subordinates are also criminally liable for the aforementioned crimes if they were related to activities under their effective responsibility and control. Liability applies if the superior knew, should have known or consciously disregarded clear indications that the subordinate was committing or intended to commit such a crime but failed to take appropriate measures. As for the responsibility, part 3 of Art. 31.1 provides that military commanders, persons effectively acting as military commanders and other superiors are held criminally liable under this article and the corresponding article of the CCU that defines the responsibility for the crimes committed by their subordinate.

Also, specific definitions are provided to clarify key terms:

- a "military commander" is a person lawfully authorised to exercise command and control over subordinates engaged in hostilities as part of a state's armed forces;
- a "person effectively acting as a military commander" is a person who, due to hostilities, exercises effective authority and control over subordinates engaged in hostilities but who is not a member of the state's armed forces;
- a "superior" is any person who holds a position or is in a situation that grants them authority and control over subordinates but does not fall under the definitions of a military commander or a person effectively acting as one.

In this provision, the Code fully introduces the provisions of Art. 28 of the Rome Statute, establishing a standard of command responsibility in accordance with the internationally accepted one. It penalises such forms of a commander's inaction as the lack of control over international crimes committed by the subordinates. In accordance with the international standard expressed in Art. 28 of the Rome Statute, a commander or a superior shall be criminally responsible not only for the results of commands given to subordinates, but also for crimes committed by subordinates under their effective authority and control as a result of their

failure to properly exercise control over their subordinates (so persons who either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes, crimes concerned activities that were within the effective responsibility and control of the superior); and the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities. Moreover, the Law of 9 October 2024 foresees punishing superiors and military commanders with the deprivation of liberty for no less than the punishment handed down to their subordinates.

6. THE CRIME OF AGGRESSION

On the basis of the new Law of 9 October 2024, the names of crimes have also been changed to align with the terminology used in the Rome Statute. Presently, Art. 437 is entitled "Crime of aggression." In the previous version, the provision relating to the "crime of aggression" was entitled "Planning, preparation, initiation, and conduct of an aggressive war" (Art. 437).[51] Presently, the crime of aggression is understood as planning, preparation or initiation of an aggressive war or military conflict, as well as participation in a conspiracy aimed at committing such acts ("leaders' crime" – part 1), and the conduct of an aggressive war or aggressive military actions (the crime of conducting war – part 2).

Stricter penalties have been introduced for the crime of aggression. The minimum and maximum penalties in part 1 of Art. 437 have been increased to 10 to 15 years of imprisonment (previously 7 to 12 years), and in part 2 of Art. 437 the punishment has been changed to imprisonment for 12 to 15 years or life imprisonment (previously 10 to 15 years).

In consequence it is visible that the criticism towards Bill No. 7290 for incorrectly implementing the international standard is still valid. The new Law of 9 October 2024 does not indicate the leadership character of the crime of aggression, although the international standard provides that only military and political leaders of the state can be held responsible for the crime of aggression.[52] At the same time, in the Rome Statute this crime can only be committed by a person with certain authority, which is why it is referred to as a "leadership crime". As a result, on the basis of this

[51] *See e.g.* S. Denisov, K. Kardash, *Визначення поняття агресивна війна у кримінальному праві України* [Definition of the Concept of Aggressive War in the Criminal Law of Ukraine], 3 Bulletin of Luhansk State University of Internal Affairs named after EO Didorenko 96 (2012); Y. Kamardina, S. Kovaliov, *Сутність понять" агресивна війна" і" воєнний конфлікт": співвідношення та міжнародно-правовий аспект* [The Essence of the Concepts "Aggressive War" and "Military Conflict": Relationship and International Legal Aspect], 15 Bulletin of Mariupol State University, Series: Law 82 (2018).

[52] Kosylo, Dmytriv, *supra* note 1, p. 356.

provision, each Russian prisoner of war could potentially be prosecuted for having committed the crime of aggression – and sentenced for a much more severe penalty, as the conduct of an aggressive war is also punishable with life imprisonment. Also, the definition of the crime of aggression is not precise and, above all, lacks an explanation of the notion of "an aggressive war".

It cannot be said that the new Ukrainian legislation aligns its definitions with international law. Thus, the definition from Art. 8*bis* of the Rome Statute – as well as other sources of international law – should be used to clarify the notion of "an aggressive war". Article 8*bis* of the Rome Statute refers to the concept of an "act of aggression", as formulated in United Nations General Assembly Resolution 3314 of 1974,[53] which defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" and lists "acts of aggression" (committed regardless of a declaration of war), although the list is open-ended (Art. 4 of the Resolution states that the acts enumerated above are not exhaustive). The regulation of Art. 8*bis* also indicates that acts of aggression must reach a certain threshold, namely they must violate the Charter of the United Nations by their nature, gravity or scale.[54] In consequence, the Ukrainian courts have to refer in their decisions to the concept of the crime of aggression as defined in international law. However, the practice of Ukrainian courts proves that the leadership element has been applied *de facto* so far: according to the Prosecutor General's Office, by 30 August 2024, 94 such crimes had been registered since the beginning of the large-scale Russian aggression against Ukraine (since 24 February 2022). At present, a "magistral" criminal case under Art. 437 CCU has been opened, involving 687 suspects: ministers (defence and interior), members of parliament, military commanders, senior officials, heads of law enforcement agencies and instigators of war (although this list of suspects does not include the leaders of the Troika, due to their personal immunities).[55]

Also, the wording of Art. 437 CCU does not clarify the legal situation or consequences of other hostile acts that would reach a certain level of severity, aimed at the sovereignty and integrity of a state. In view of the growth of various formations, groups and gangs representing state-related actors, the national provisions could have been extended so that members of armed groups, organisations or gangs acting on behalf of state-related groups could be subject to criminal liability for acts of

[53] UNGA resolution of 14 December 1974, *Definition of Aggression*, Doc. A/RES/3314.

[54] R. Heinsch, *The Crime of Aggression after Kampala: Success or Burden for the Future?*, 2(2) Goettingen Journal of International Law 713 (2010), p. 724; P. Grzebyk, *Crime of Aggression against Ukraine: The Role of Regional Customary Law*, 21(3) Journal of International Criminal Justice 435 (2023).

[55] *See* the analysis provided in Korynevych, Senatorova, Shepitko, *supra* note 12, p. 377, based on the Prosecutor General's Office. For a list of suspects in the main case of "24th February", *see Spysok Pidozryuvanykh Mahistral'noyi Spravy "24 Lyutoho"* [List of Susupects in the "24th February" Master Case], Prosecutor General's Office, available at: https://gp.gov.ua/detectable (accessed 30 June 2025).

aggression (broadly including any terrorist or mercenary organisations, regardless of whether they operate within a legal organisation or outside any state structures, but having within the group itself a strictly defined hierarchy or division of competences),[56] in the way that it penalises acts of aggression committed by cyber warfare.[57]

7. WAR CRIMES

When it comes to war crimes and the changes introduced by the new Law of 9 October 2024, only the names of provisions were changed. Previously, "war crimes" were referred to as "violations of the laws and customs of war" (Art. 438 CCU). At the same time, the definitions of these crimes remain unchanged. In turn, "war crimes" include "cruel treatment of prisoners of war or civilians, forced labour deportation of civilians, plundering of national treasures in occupied territory, use of warfare methods prohibited by international law and other violations of the laws and customs of war as provided for in international treaties ratified by the Verkhovna Rada of Ukraine, as well as issuing orders for such actions" (part 1). The same acts, if they result in death, fall under part 2. It is important to note that in the previous version, the war crimes described in part 2 were related to "acts combined with intentional killing", whereas the new version uses a broader formulation: "acts that resulted in the death of a person." This version does not require criminal intent, but also covers negligence and omission, changing (extending) the *mens rea* element of this crime.

The Code, however, does not precisely define what is "provided for in international treaties". The article, as in the previous form, still has a blanket character.[58] The wording of the Ukrainian law is based on the monistic system of law, which takes into consideration that ratified international agreements constitute part of the domestic legal order and shall be applied directly, unless their application depends on the enactment of a statute (as Art. 9 of the Constitution of Ukraine states: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine"). Therefore, when the Code penalises the use of "means and methods forbidden by international treaties", relevant norms of international law should be applied to define which means and

[56] *See* P. Grzebyk, K. Kowalczewska, K. Kremens, H. Kuczyńska. K. Wierczyńska, *Efektywne ściganie zbrodni międzynarodowych w Polsce: konieczne zmiany w polskim systemie prawnym i w podejściu do międzynarodowego prawa karnego* [Effective prosecution of international crimes in Poland: Necessary changes in the Polish legal system and in the approach to international crimes], Helsinki Foundation for Human Rights, Warsaw: 2024, available at: https://hfhr.pl/publikacje/sciganie-zbrodni-miedzynarodowych (accessed 30 June 2025).

[57] D. Scheffer, *The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute*, 58 Harvard International Law Journal 83 (2017), p. 84.

[58] Kosylo, Dmytriv, *supra* note 1, p. 359; Anosova, Aksamitowska, Sancin, *supra* note 1, p. 663; *Principle of Complementarity...*, *supra* note 20.

methods are forbidden. Currently, the prosecutors or the courts are forced to independently recreate Ukraine's obligations in the scope of international law, deciding in every case what is the scope of international obligations resulting from international treaties.[59]

8. THE CRIME OF GENOCIDE

The definition of the crime of genocide has been slightly modified. In the previous version, it referred to "inflicting severe bodily harm", whereas the new version uses the term "causing serious harm to members of a group." According to the note to this Article, "serious harm" should be understood as "causing severe bodily harm or moderate bodily harm, committing rape or other forms of sexual violence, causing severe physical pain or physical or moral suffering."

The elements of the type of crime of "incitement to genocide" have also been changed. The previous version described it as "public incitement to genocide, as well as the production of materials with incitements to genocide for distribution or the distribution of such materials." The new version refers to "direct and public incitement to commit acts provided for in part 1 of this article, proclaimed with the aim of fully or partially destroying a national, ethnic, racial, or religious group as such, as well as the production of materials containing incitements to commit such acts for the distribution of such materials."

However, the penalties for the crime of genocide have not been changed. In both versions, the penalty is imprisonment for a term of 10 to 15 years or life imprisonment. The statute of limitations for prosecuting "public incitement to genocide" has also been revised. Previously, the limitation period for this act was determined by the general rule and was 5 years. Under the new changes, no statute of limitations applies to this crime, as is the case with other international crimes covered by Arts. 437–439, 442 and 442[1] CCU (part 5 of Art. 49 CCU).

However, the Ukrainian legislature did not use this opportunity of enacting the new law to widen the definitions and scope of the crime of genocide. Both the 1949 Convention[60] and the Rome Statute protect only certain groups and certain actions. As a result, actions taken against groups other than those listed in the characteristics of the crime of genocide are not penalised as genocide (they may be qualified as different crimes, most often crimes against humanity). The definition currently

[59] *See e.g.* D. Kolodiazhna, *How Ukraine Passes Judgment on Violations of the Laws and Customs of War?*, Zmina, 24 April 2024, available at: https://zmina.info/en/articles-en/how-ukraine-passes-judgment-on-violations-of-the-laws-and-customs-of-war/ (accessed 30 June 2025). *See also Principle of Complementarity...*, *supra* note 20.

[60] Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

used in international criminal law assumes only a limited dimension of genocide: only aspects of physically exterminating a given group are covered; not all actions aimed at exterminating a given group were included. According to Rafał Lemkin, these usually constitute subsequent elements/stages of a large-scale, coordinated plan aimed at destroying the basic principles of the life of national groups, leading to the annihilation and destruction of that group. Lemkin wrote about a set of such actions, including all of them in the characteristics of the crime of genocide: genocide in the political, social, cultural, economic, biological, physical, religious and moral spheres.[61] At the same time, some scholars have claimed that the annihilation of Ukrainians who identify themselves as members of the independent Ukrainian nation should be defined as a crime of genocide.[62] In the view of the old definition, it is difficult (but not impossible) to establish genocidal intent in the real goal behind the systematic military attacks, the destruction of objects of Ukrainian cultural heritage, the russification carried out through bans on Ukrainian books and language in the Ukrainian territories occupied by Russia and the systematic, discriminatory nature of the mass atrocities committed by Russian armed forces in Ukraine. It is disappointing that the legislature did not expand the definition of genocide beyond that established in international law so many years ago, and did not take the opportunity to define cultural, social, political and economic annihilation of a protected group as a crime of genocide. It could have been done without infringing the standard of international law – the standard adopted by states in national legislation can always be higher – thus setting a direction for the development of state practice. At the same time, the compliance with the standard of the ECHR must be assured. From the case law of the Court it results that domestic provisions may contain a definition of an international crime broader than that existing under international law, but that broader definition cannot be applied retroactively by domestic courts.[63]

[61] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Division of International Law, Washington: 1944, p. 82; K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc* [The Concept of Genocide in the Context of the Jurisprudence of International ad hoc Criminal Tribunals], Wydawnictwo Naukowe Scholar, Warsaw: 2010, p. 13.

[62] *E.g.* D. Azarov, D. Koval, G. Nuridzhanian, V. Venher, *Understanding Russia's Actions in Ukraine as the Crime of Genocide*, 21(2) Journal of International Criminal Justice 233 (2023).

[63] *See e.g.* ECtHR, *Vasiliauskas v. Lithuania* (App. No. 35343/05), 20 October 2015, paras. 181 and 184, concerning the Lithuanian expanded definition of genocide to include "political groups"; *see also* ECtHR, *Drėlingas v. Lithuania* (App. No. 28859/16), 12 March 2019, para. 107.

CONCLUSIONS

The new legislation on international crimes that entered into force on 24 October 2024 can generally be assessed as coherent and complying with international law. In consequence, Ukrainian authorities can now prosecute crimes against humanity, crimes committed by superiors and commanders and other international crimes in the new form, if they were committed after this date –based on national law and in accordance with the principle of *nullum crimen sine lege certa/scripta*. Moreover, the new legal status of the Rome Statute allows its provisions to be used on the basis of Art. 9 of the Constitution of Ukraine, which states that "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."

However, the new legislation has also faced criticism. Much of the criticism that was expressed at earlier stages of adopting changes to the CCU is still valid. In the final version there is still the problem of the non-leadership character of the crime of aggression. Although the international standard provides that only military and political leaders of the state could be held responsible for the crime of aggression, the Ukrainian version leads to the conclusion that each Russian prisoner of war could be prosecuted for having committed the crime of aggression. Also, the blanket character of penalisation of war crimes has not been changed, and the national norms must always be interpreted and read together with the relevant norms of international law that define which means and methods of warfare are forbidden. In every case it is necessary to establish the scope of international obligations resulting from international treaties. To align with international standards, a more precise definition of war crimes should be necessary, one that focusses on "grave breaches" or "serious violations" of international law, as outlined in the Rome Statute.[64]

Moreover, some other solutions adopted by the Ukrainian legislature seem to be unduly limited. Firstly, the character of universal jurisdiction is limited to prosecuting perpetrators who are on the territory of Ukraine and have not been extradited. However, this solution should be evaluated as insufficient, as the aim of universal jurisdiction is to prevent impunity for perpetrators of the most serious crimes. From this perspective, it should be assumed that there is an obligation to also prosecute on the basis of the universal principle those perpetrators who are not on the territory of the given state. The principle of universal jurisdiction should be exercised not only on the condition that the perpetrator is present on the territory of Ukraine, but also against perpetrators who are not, giving grounds for extradition requests in order to bring them before the national courts. Secondly, a wider scope

[64] Kosylo, Dmytriv, *supra* note 1, p. 364.

of the definition of genocide could have been introduced, in line with Lemkin's understanding of the real harmfulness of this international crime.

In sum, the new legislation is a required step towards introducing international standards for elements of international crimes, truly fulfilling the goals of international criminal law, but cannot be considered to be the final step; there is still room for improvement. When it comes to achieving justice for all crimes committed on the territory of Ukraine, it is of utmost importance that in the times of war and afterwards, the definitions and scopes of international crimes and the methods of implementing international criminal law are operational and sufficient. It is worth noting that a new draft law is currently being discussed, which would establish a new legal act on international crimes, similar to the law existing in Germany or the Netherlands.[65] The solutions presented therein raise many doubts.[66]

Table 1. Authors' own analysis

Title	Date
Art. 8. The operation of the law on criminal liability with regard to offences committed by foreign nationals or stateless persons outside Ukraine 1. Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code. 2. Foreign nationals or stateless persons who do not reside permanently in Ukraine shall also be liable in Ukraine under this Code if they have committed any criminal offence outside Ukraine provided for by Articles 368, 368-3, 368-4, 369, and 369-2 hereof in complicity with officials who are citizens of Ukraine or if they offered, promised, provided improper advantages to such officials, or accepted a proposal, a promise of improper advantages or received such advantage from them.	Art. 8. The operation of the law on criminal liability with regard to offences committed by foreign nationals or stateless persons outside Ukraine 1. Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code. 2. Foreign nationals or stateless persons who do not permanently reside in Ukraine and who have committed any of the crimes provided for in Articles 437–439, 442, and 4421 of this Code outside Ukraine shall be subject to criminal responsibility in Ukraine under this Code, regardless of the conditions specified in Part 1 of this Article, if such persons are present in the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused. 3. Foreign nationals or stateless persons who do not reside permanently in Ukraine shall also be liable in Ukraine under this Code if they have committed any criminal offence outside Ukraine provided for by Articles 368, 368-3, 368-4, 369, and 369-2 hereof in complicity with officials who are citizens of Ukraine or if they offered, promised, provided improper advantages to such officials, or accepted a proposal, a promise of improper advantages or received such advantage from them.

[65] Проект Закону про кримінальну відповідальність за міжнародні злочини [Draft Law on criminal responsibility for international crimes], No. 11538 of 2 September 2024, available at: https://itd.rada.gov.ua/billInfo/Bills/Card/44789 (accessed 30 June 2025).

[66] *See Human Rights Defenders...*, *supra* note 11.

Title	Date
Art. 437. Planning, preparation and waging of an aggressive war 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.	Art. 437. Crime of aggression 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes, shall be punishable by imprisonment for term of ten to fifteen years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of twelve to fifteen years or life imprisonment.
Art. 438. Violation of rules of the warfare 1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years. 2. The same actions, where they are accompanied with premeditated murder shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.	Art. 438. War crimes 1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years. 2. The same actions, where they are accompanied with premeditated murder, shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.
Art. 442. Genocide 1. Genocide, that is a wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grievous bodily injuries on them, creation of life conditions aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment. 2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials shall be punishable by arrest for a term of up to six months, or imprisonment for a term of up to five years.	Art. 442. Genocide 1. Genocide, meaning acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such, by means of: 1) killing members of the group; 2) causing serious harm to members of the group; 3) creating living conditions for the group aimed at its total or partial physical destruction; 4) implementing measures intended to prevent births within the group; 5) forcibly transferring children from one group to another, shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment. 2. Direct and public incitement to commit acts specified in the first part of this article, proclaimed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such, as well as the production of materials containing calls for such acts for the purpose of dissemination or the dissemination of such materials shall be punishable by imprisonment for a term of three to seven years. Note: For the purposes of this article, serious harm shall mean causing grievous bodily harm or moderate bodily harm, committing rape or other forms of sexual violence, inflicting severe physical pain, or causing physical or moral suffering.

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THE ENFORCEMENT OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS BY THE ADMINISTRATIVE COURTS IN POLAND AND CZECHIA

Abstract: *The article aims to explore the enforcement of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by administrative courts in Poland and Czechia. The concluding observations of the Committee on Economic, Social and Cultural Rights have suggested significant differences between the two countries in this regard for many years. However, the exact reasons underlying this discrepancy remained unclear. The paper provides comprehensive insight into this legal phenomenon. Firstly, the author reconstructs the obligations relating to the economic, social and cultural (ESC) rights imposed on administrative courts. Secondly, the results of a large-scale review of the domestic rulings are presented. Based on the quantitative and qualitative analysis of the existing case law, it is revealed that the Polish and Czech courts share significant similarities in enforcing ESC rights. The study indicates that comparable shortcomings in terms of judicial enforcement of the Covenant are inherent in both jurisdictions. Thirdly, the author points to the existing methods available for the administrative courts that can still be used to strengthen the protection of the rights recognised in the ICESCR.*

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Keywords: ICESCR, ESC rights, enforcement, justiciability, administrative justice

INTRODUCTION

The focus of the international legal discourse regarding the realisation of economic, social and cultural (ESC) rights has long centred on the jurisprudence of constitutional courts.[1] Meanwhile, the role of administrative courts in enforcing these rights has received comparatively less scholarly attention despite their crucial role in protecting individuals from unlawfulness of the national authorities.[2] It is therefore reasonable to infer that they also bear a vital responsibility in ensuring the enforcement of ESC rights, such as the right to education and the right to health.[3]

This paper contributes to the ongoing academic debate on ESC rights by conducting a comprehensive study of the approaches taken by administrative courts in enforcing the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant). The analysis encompasses the case law from two countries: Poland and Czechia. The selection of these legal orders is justified in a number of respects. Both countries share significant similarities resulting from historical experiences. The implementation of the ICESCR has consequently been significantly impeded by the economic conditions following the transition from a communist system to a free market-orientated model in the 1990s.[4] It is important to note that the constitutional acts of these states contain detailed catalogues of ESC rights, albeit with provisions aimed at limiting their judicial enforcement.[5] Lastly, it is noteworthy that these are the only states in continental Europe that attempted to limit the justiciability of the "solidarity" rights

[1] *E.g.* F. Lucherini, *The Constitutionalization of Social Rights in Italy, Germany, and Portugal: Legislative Discretion, Minimal Guarantees, and Distributive Integration*, 25(2) German Law Journal 335 (2024); A. Chilton, M. Versteeg, *How Constitutional Rights Matter*, Oxford University Press, New York: 2020, pp. 167–206; K.G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, in: V.C. Jackson, M. Tushnet (eds.), *Proportionality. New Frontiers, New Challenges*, Cambridge University Press, Cambridge: 2017, pp. 248–272; B. Ray, *Policentrism, Political Mobilization and the Promise of Socioeconomic Rights*, 45(1) Stanford Journal of International Law 151 (2009).

[2] *See also* Recommendation Rec(2004)20 of the Committee of Ministers to Member States on Judicial Review of Administrative Acts, 15 December 2004.

[3] *See also* M. Wyrzykowski, *Der Schutz der sozialen Grundrechte in der Rechtsordnung Polens*, in: J. Iliopoulos-Strangas (ed.), *Soziale Grundrechte in den "neuen" Mitgliedstaaten der Europäischen Union. Zugleich eine Einführung in die mitgliedstaatlichen Allgemeinen Grundrechtslehren*, Nomos Verlagsgesellschaft, Baden-Baden: 2019, pp. 476–477; V. Šimíček, M. Kokeš, *Der Schutz der sozialen Grundrechte in der Rechtsordnung Tschechiens,* in: J. Iliopoulos-Strangas (ed.), *Soziale Grundrechte in den "neuen" Mitgliedstaaten der Europäischen Union. Zugleich eine Einführung in die mitgliedstaatlichen Allgemeinen Grundrechtslehren*, Nomos Verlagsgesellschaft, Baden-Baden: 2019, pp. 808–810.

[4] CESCR, *Concluding observations on the third periodic report of Poland* (E/C.12/1/Add.26), para. 9; CESCR, *Concluding observations on the initial report of the Czech Republic* (E/C.12/1/Add.76), para. 7.

[5] These provisions will be discussed in the first section.

enshrined in the EU Charter of Fundamental Rights. However, Czechia eventually withdrew from this idea.[6]

The parties to the ICESCR are obliged to submit their initial reports within two years of the Covenant's entry into force, and thereafter periodic reports at five-year intervals.[7] The approaches taken by national courts can therefore be studied to some extent based on the concluding observations of the UN Committee on Economic, Social and Cultural Rights (the Committee), which are in principle adopted after the Committee reviews the available data gathered through the monitoring mechanism, including extensive state party reports and submissions from NGOs and UN specialised agencies.[8] These documents provide a general overview of the implementation of the ICESCR.

Since the 1989 transition, Poland has been evaluated by the Committee five times – in 1998,[9] 2002,[10] 2009,[11] 2016[12] and 2024.[13] So far, the Committee has also adopted concluding observations regarding Czechia based on an initial report (in 2002)[14] and two subsequent periodic reports (in 2014[15] and 2022[16]). After reviewing the existing concluding observations, one could posit that at some juncture, the Czech courts adopted a different approach to enforcing the ESC rights than the Polish courts. Formerly, at the beginning of the 21st century, both countries failed to present compelling evidence that individuals could invoke the rights enshrined in the Covenant before the courts. While listing the principal subjects of concern in 2002, the Committee stated that the Covenant had "not been given full effect" in Czechia, underlying that most of the rights were not deemed "justiciable".[17] In

[6] *See generally* Wyrzykowski, *supra* note 3, pp. 422–423; European Parliament Resolution of 22 May 2013 on the Draft Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union), 00091/2011 – C7-0385/2011 – 2011/0817(NLE); Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2008] OJ C 115, 09/05/2008, pp. 313–314.

[7] Art. 17 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Rule 58 § 2 in Committee on Economic, Social and Cultural Rights, Rules of Procedures of the Committee, 1 September 1993, E/C.12/1990/4/Rev.1.

[8] M. Langford, J.A. King, *Committee on Economic, Social and Cultural Rights: Past, Present and Future*, in: M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, Cambridge: 2008, p. 479.

[9] CESCR, *Concluding observations on the third periodic report of Poland* (E/C.12/1/Add.26).

[10] CESCR, *Concluding observations on the fourth periodic report of Poland* (E/C.12/1/Add.82).

[11] CESCR, *Concluding observations on the fifth periodic report of Poland* (E/C.12/POL/CO/5).

[12] CESCR, *Concluding observations on the sixth periodic report of Poland* (E/C.12/POL/CO/6).

[13] CESCR, *Concluding observations on the seventh periodic report of Poland* (E/C.12/POL/CO/7).

[14] CESCR, *Concluding observations on the initial report of the Czech Republic* (E/C.12/1/Add.76).

[15] CESCR, *Concluding observations on the second periodic report of the Czech Republic* (E/C.12/CZE/CO/2).

[16] CESCR, *Concluding observations on the third periodic report of Czechia* (E/C.12/CZE/CO/3).

[17] CESCR, *Concluding observations on the initial report of the Czech Republic* (E/C.12/1/Add.76), para. 8.

the same year, Poland was explicitly requested to provide relevant case law in the next periodic report and was urged to raise awareness of the Covenant.[18]

Significant differences occurred in the following reporting periods. In 2014, Czechia ascertained that the Supreme Administrative Court (SAC) had adjudicated some cases concerning ESC rights.[19] In 2022, the Committee also noted that the Covenant had been referred by the Czech SAC.[20] Meanwhile, the practices of the Polish courts were criticised. In 2009, the Committee expressed its concern, noting that the provisions of the ESC rights were viewed as "programmatic, aspirational and not justiciable."[21] Essentially, the same problem was noted in the 2016 concluding observations.[22] As late as September 2024, the Committee noted, for the first time, "the full applicability of the Covenant by domestic courts" in Poland; however, it did not specify which courts had invoked the Covenant in recent years. A "low level of awareness of the Covenant in the wider justice system" was still listed as one of the primary areas of concern.[23]

The aim of the article is therefore to explore the enforcement of the ICESCR in the administrative justice system in Poland and Czechia. This is achieved by examining the approaches taken by the respective national courts in both jurisdictions based on the existing case law. According to the UN documents referenced above, it can be inferred that the Czech courts developed, at an earlier stage, some distinctive methods for adjudicating cases related to ESC rights. However, none of the concluding observations delves into the particularities of these approaches.

The subject of this research is of considerable importance since "perhaps no other human rights treaty is violated in as obdurate or frequent a way as the International Covenant on Economic, Social and Cultural Rights."[24] In addition to numerous shortcomings in its implementation, the justiciability of the rights contained therein has been repeatedly questioned, mainly because of the economic burden of realising them.[25] The notion of non-enforceability, however, has been dismissed by some

[18] CESCR, *Concluding observations on the fourth periodic report of Poland* (E/C.12/1/Add.82), para. 33.

[19] CESCR, *Concluding observations on the second periodic report of the Czech Republic* (E/C.12/CZE/CO/2), para. 5.

[20] CESCR, *Concluding observations on the third periodic report of Czechia* (E/C.12/CZE/CO/3), para. 4.

[21] CESCR, *Concluding observations on the fifth periodic report of Poland* (E/C.12/POL/CO/5), para. 8.

[22] CESCR, *Concluding observations on the sixth periodic report of Poland* (E/C.12/POL/CO/6), para. 5.

[23] CESCR, *Concluding observations on the seventh periodic report of Poland* (E/C.12/POL/CO/7), para. 4.

[24] S. Leckie, *Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20(1) Human Rights Quarterly 81 (1998), p. 82. This statement was expressed in 1998, but it remains relevant today. Profound negative impacts on the enjoyment of economic, social and cultural rights have been especially evident in times of crisis, such as the COVID-19 pandemic. *See also* CESCR, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*, 17 April 2020 (E/C.12/2020/1).

[25] K.L. Scheppele, *A Realpolitik Defense of Social Rights*, 82(7) Texas Law Review 1921 (2004), pp. 1930–1931.

significant judicial bodies[26] and the Committee itself, which will be discussed later in the article. For this reason, it is certainly worth discussing how the ESC rights are (or can be) enforced before domestic courts.

The subsequent sections of this article are organised as follows: Section 1 undertakes a reconstruction of the obligations placed upon the administrative courts in relation to the realisation of the ICESCR, taking into consideration the constitutional frameworks. The analysis also covers the Czech Charter of Fundamental Rights and Freedoms, which is a legally binding "part of the constitutional order" of the Czech Republic.[27] Section 2 presents the results of the analysis covering the case law of the Polish and Czech administrative courts. It should be noted that the scope of this research encompasses all the rulings available in the official public databases. Employing both qualitative and quantitative methods, this study provides a continuation of previous research endeavours by offering a comprehensive understanding of domestic practices.[28] Section 3 aims to refine methods for the judges adjudicating cases concerning ESC rights to apply the Covenant. The insights contained in this section may be leveraged to strengthen the protection of these rights in both legal orders. The key findings are listed in the conclusions.

1. OBLIGATIONS IMPOSED ON THE ADMINISTRATIVE COURTS

The status of international agreements to which Poland and Czechia are bound is explicitly regulated in the constitutions of both countries. According to Art. 10 of the Czech Constitution and Art. 91 of the Polish Constitution, ratified and promulgated international agreements form a part of the relevant domestic legal order.[29]

[26] *See generally* M. Langford, *The Justiciability of Social Rights: From Practice to Theory*, in: M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, Cambridge: 2008, pp. 8–9.

[27] Art. 3 of Ústava České Republiky [The Constitution of the Czech Republic], 16 December 1992, Ústavní zákon č. 1/1993 Sb.; K. Klima, *Constitutional Law of the Czech Republic*, 5 Cuestiones Constitucionales 173 (2001), pp. 190–191.

[28] H.C. Scheu, J. Brodská, *The Impact of the United Nations Human Rights Treaties on the Domestic Level in the Czech Republic*, in: C. Heyns, F.J. Viljoen, R. Murray (eds.), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On*, Brill, Leiden: 2024, p. 323; K. Sękowska-Kozłowska, G. Baranowska, J. Grygiel-Zasada, Ł. Szoszkiewicz, *The Impact of the United Nations Human Rights Treaties on the Domestic Level in Poland*, in: C. Heyns, F.J. Viljoen, R. Murray (eds.), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On*, Brill, Leiden: 2024, pp. 863–864; A. Tychmańska, *Znaczenie Międzynarodowego Paktu Praw Obywatelskich i Politycznych oraz Międzynarodowego Paktu Praw Gospodarczych, Społecznych i Kulturalnych dla polskiego porządku prawnego na przykładzie analizy orzecznictwa polskich sądów administracyjnych* [The significance of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights for the Polish legal order based on the analysis of judicature of Polish administrative courts], 34(20) Studenckie Zeszyty Naukowe 71 (2017).

[29] Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland], 2 April 1997, Dz.U. 1997, no. 78, item 483, as amended; Ústava České Republiky [The Constitution of the Czech Republic], 16 December 1992, Ústavní zákon č. 1/1993 Sb.

Furthermore, agreements ratified with prior consent granted by the Parliaments take precedence over statutes. If such an agreement provides something different from what a Czech statute provides, the agreement shall apply (*stanoví-li mezinárodní smlouva něco jiného než zákon, použije se mezinárodní smlouva*).[30] Similarly, if the agreement cannot be reconciled with the provisions of the Polish statutes (*jeżeli ustawy tej nie da się pogodzić z umową*), it may be applied directly, unless its application depends on the enactment of a statute (*jest bezpośrednio stosowana, chyba że jej stosowanie jest uzależnione od wydania ustawy*).

The ICESCR is considered an international agreement ratified with prior consent from both Parliaments, thus forming a part of both domestic legal orders. This is significant as, in accordance with Art. 2 of the Covenant, each state party is obliged to "take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The primary responsibility for implementing the ICESCR therefore rests with the legislature. While enacting statutes is certainly an "appropriate means" of achieving the full realisation of ESC rights, there are also other indispensable measures that should be adopted at the national level.[31]

The national courts in Poland and Czechia, particularly the administrative courts, are not exempted from the duty to take adequate "steps" to enhance the protection of ESC rights.[32] It is imperative for the courts of the state parties to consider Covenant rights where necessary to ensure the consistency of the state's conduct with its obligations, as delineated in General Comment No. 9, issued in 1998 by the Committee on Economic, Social and Cultural Rights.[33] Moreover, the Committee suggested as early as 1990 that several provisions in the ICESCR are "capable of immediate application by judicial organs."[34]

The primary issue is the necessity of identifying the circumstances under which these Covenant provisions should be applied by the courts. The obligations imposed

[30] The priority applies if there is an actual contradiction (*skutečný rozpor*) between the treaty and the statute. *See also* V. Mikule, R. Suchánek, *Commentary on Article 10*, in: V. Sládeček, V. Mikule, J. Syllová, (eds.), *Ustava České republiky. Komentář* [The Constitution of the Czech Republic: A Commentary], C.H. Beck, Praha: 2016, p. 127.

[31] *E.g.* M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Bloomsbury Publishing, London: 2016, pp. 84–90; Langford, King *supra* note 8, p. 496; A.R. Chapman, *The Status of Efforts to Monitor Economic, Social, and Cultural Rights*, in: S. Hertel, L. Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues*, Cambridge University Press, New York: 2007, p. 146.

[32] *See also* J. Kratochvíl, *Judikovatelnost sociálních práv: nějaké mezery?* [The Justiciability of Social Rights: Are There Any Gaps?], 155(11) Právník 1161 (2007).

[33] CESCR, *General Comment No. 9 on the Domestic Application of the Covenant*, 3 December 1998 (E/C.12/1998/24), para. 10.

[34] CESCR, *General Comment No. 3 on the Nature of States Parties' Obligations*, 14 December 1990 (E/1991/23), para. 5.

on administrative courts are further complicated by the limitation provisions in the constitutional acts of both states.[35] According to Art. 41 of the Czech Charter of Fundamental Rights and Freedoms, certain ESC rights specified in a number of constitutional provisions "may be claimed only within the scope of the laws implementing these provisions" (*možno se domáhat pouze v mezích zákonů, které tato ustanovení provádějí*).[36] Under Art. 81 of the Polish Constitution, some rights "may be asserted subject to limitations specified by statute" (*można dochodzić w granicach określonych w ustawie*). Although the provisions specifically refer to the rights contained in the constitutional acts, not in the provisions of the ICESCR, it is worth noting that these constitutional rights generally correspond (to varying degrees) to the rights included in the Covenant (Table 1).

Table 1. ESC rights covered by the limitation provisions in each country

International Covenant on Economic, Social and Cultural Rights	Czech Charter of Fundamental Rights and Freedoms	Polish Constitution
Art. 6 – the right to work	Art. 26 – the right to freely choose one's profession and the training for such profession; the right to engage in enterprise and pursue other economic activity	Art. 65(5) – the obligation of public authorities to pursue policies aiming at full, productive employment
Art. 7 – the right to the enjoyment of just and favourable conditions of work	Art. 28 – the right to fair remuneration for one's work and to satisfactory work conditions	Art. 65(4) – a minimum level of remuneration for work Art. 66 – the right to safe and hygienic conditions of work; the right to statutorily specified holidays and annual paid leave
Art. 8 – the rights related to trade unions	Art. 27(4) – the right to strike	*not covered by the limitation provision*
Art. 9 – the right to social security	Art. 30(1) – the right to adequate material security in old age, during periods of incapacity for work and in the case of the loss of one's provider	*not covered by the limitation provision*

[35] The similarity of these limitation provisions has been pointed out in the existing literature: J. Wintr, *Commentary on Article 41*, in: I. Pospíšil, E. Wagnerová, V. Šimíček, T. Langášek (eds.), *Listina základních práv a svobod – Komentář* [The Charter of Fundamental Rights and Freedoms – A Commentary], Wolters Kluwer, Praha: 2012, p. 832.

[36] Listina základních práv a svobod [The Charter of Fundamental Rights and Freedoms], 9 January 1991, Ústavní zákon č. 23/1991 Sb.

International Covenant on Economic, Social and Cultural Rights	Czech Charter of Fundamental Rights and Freedoms	Polish Constitution
Art. 10 – the protection of families, children, adolescents and mothers during a reasonable period before and after childbirth	Art. 29 – the right of women, adolescents and persons with health problems to increased protection of their health at work and to special work conditions; the right of adolescents and persons with health problems to special protection in labour relations and to assistance in vocational training Art. 32(1) – the protection of parenthood, the family, children and adolescents	Art. 69 – the obligation of public authorities to provide aid for persons with disabilities Art. 71 – the protection of the family; the right of mothers to special assistance from public authorities
Art. 11 – the right to an adequate standard of living; the right to be free from hunger	Art. 30(2) – the right to secure a basic standard of living	Art. 75 – the obligation to pursue policies conducive to satisfying the housing needs of citizens
Art. 12 – the right to the enjoyment of the highest attainable standard of physical and mental health	Art. 31 – the right to the protection of health	*not covered by the limitation provision*
Art. 13 – the right to education	Art. 33 – the right to education	*not covered by the limitation provision*
Art. 15 – the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author	*not covered by the limitation provision*	*not covered by the limitation provision*
not explicitly enshrined in the Covenant	Art. 35 – the right to a favourable environment; the right to timely and complete information about the state of the environment and natural resources	Art. 74 – protection of the environment; the right to be informed of the quality of the environment and its protection
not explicitly enshrined in the Covenant	Art. 32(3) – the equal rights of children	–
not explicitly enshrined in the Covenant	–	Art. 76 – the protection of consumers, customers, hirers and lessees

It must be emphasised that although Polish and Czech administrative courts are not identical, they remain comparable. There are still some differences that make the administrative justice systems distinctive. Most importantly, in Czechia, the

functions of first-instance administrative courts are performed by benches within ordinary (regional) courts,[37] while in Poland first-instance courts are separate from ordinary courts.[38] However, both systems can be considered "similar in structural and procedural terms" to the extent that comparing them is "justified".[39] The administrative courts in Czechia and Poland play a fundamental role in overseeing the actions of national authorities by evaluating the legality of their activity and inactivity so that the rights of individuals are protected.[40] They are, in principle, based on a very similar model of court review developed previously in Austria.[41] Even though classifying certain acts of administrative authorities might pose challenges in judicial practice,[42] the scopes of the courts' jurisdictions are similar. Therefore, it can be said that they perform comparable functions.[43]

The review process before the administrative courts primarily focusses on ensuring compliance with relevant statutes; however, it must also take into account adherence to the ICESCR. To demonstrate this issue, one might consider an example in the field of education. For instance, if an unlawful action concerning schooling occurs due to non-compliance with domestic regulations, it can be asserted that the respective administrative court, through its review, is already fulfilling its duty to protect the right to education as enshrined in Art. 13 of the Covenant. However, if a contested decision issued by an administrative body is grounded in statutory provisions, yet raises concerns regarding its alignment with the ICESCR, it prompts the question of what appropriate measures the administrative courts should undertake in such cases.

In the context of Czechia, the court is bound by Art. 41 of the Charter, which obliges the adjudicating bench to acknowledge that the constitutional right to edu-

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[37] D. Kryska, *Organization of Czech and Polish Administrative Judiciary*, 12(1) International and Comparative Law Review 81 (2012), pp. 83–84.

[38] *See* W. Piątek, A. Skoczylas, *Geneza, rozwój i model sądownictwa administracyjnego w Polsce* [The genesis, the development and the model of administrative justice in Poland], in: R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *Sądowa kontrola administracji publicznej,* System Prawa Administracyjnego, t. 10. [Judicial control over public administration, "Administrative Law System" vol. 10], C.H. Beck, Warszawa: 2016.

[39] W. Piątek, L. Potěšil, *A Right to Have One's Case Heard within a Reasonable Time before the Czech and the Polish Supreme Administrative Courts – Standards, the Reality and Proposals for the Future*, 17(1) Utrecht Law Review 20 (2021), p. 23.

[40] *See* Zákon soudní řád správní [The Code of Administrative Justice], 21 March 2002, Zákon č. 150/2002 Sb; Ustawa Prawo o postępowaniu przed sądami administracyjnymi [The Act on Procedure before Administrative Courts], 30 August 2002, Dz.U. 2024, item 935, as amended; D. Kryska, *Konstytucyjny model czeskiego sądownictwa administracyjnego* [The Constitutional Model of the Czech Administrative Courts], 52(1) Zeszyty Naukowe Sądownictwa Administracyjnego 175 (2014), p. 176; L. Potěšil, *The Administrative Justice in the Czech Republic – Changes and Expectations*, 4(2) Opolskie Studia Administracyjno-Prawne 87 (2018), pp. 87–89.

[41] Kryska, *supra* note 39, p. 176.

[42] *See e.g.* T. Svoboda, D. Skládalová, *The Qualification of Action in Administrative Justice and its Perils – The Czech Experience*, 14 Adam Mickiewicz University Law Review 281 (2022).

[43] Piątek, Potěšil, *supra* note 38, p. 24.

cation, corresponding to Art. 13 of the Covenant, can only be asserted in accordance with the laws that implement these provisions. The situation is no less intricate in Poland. While Art. 81 of the Constitution does not explicitly reference the right to education (Art. 70),[44] the international agreement cannot be directly applied if its application depends on the enactment of a statute, as specified in Art. 91 of the Constitution. The realisation of the right to education still requires the adoption of various domestic regulations, which could give rise to the conclusion that administrative courts may face difficulties effectively addressing such an issue. Nonetheless, this does not preclude the possibility of administrative courts taking appropriate actions in this regard.[45] A different viewpoint would be – as described in General Comment No. 9 – "incompatible with the principle of the rule of law."[46]

There are several pathways available for administrative courts in Poland and Czechia to navigate this apparent impasse. It is essential that actions taken by national authorities in relation to the ESC rights are subject to rigorous scrutiny. The administrative courts must not regard themselves as exempt from the obligation to apply the ICESCR. At the same time, it is important to clarify that not every allegation of an infringement of the Covenant brought forth by a party to the proceedings is intrinsically valid.

Regardless of whether the actions of national authorities seem "lawful" under statutory regulations, it might remain the responsibility of administrative courts to assess whether any rights enshrined in the ICESCR are at risk due to the activities of the public administration. Should a potential threat be identified, I argue that, in view of the legal provisions and the stances of the Committee, the courts may proceed with appropriate steps, depending on the specific circumstances involved:

a. When assessing the legality of actions undertaken by the public administration, administrative courts are required to interpret relevant provisions in statutes, as well as potentially other domestic acts, "as far as possible in a way

[44] S. Jarosz-Żukowska, Ł. Żukowski, *Prawo do nauki i jego gwarancje* [The Right to Education and its Guarantees], in: M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym* [The Realisation and Protection of Constitutional Freedoms and Rights of Individuals in the Polish Legal Order], E-Wydawnictwo, Wrocław: 2014, p. 639; *See generally* Ł. Kierznowski, *Prawo do nauki w aktach prawa międzynarodowego* [The Right to Education in Acts of International Law], in: M. Perkowski, W. Zoń (eds.), *Umiędzynarodowienie krajowego obrotu prawnego* [The Internationalisation of the Domestic Legal Order], Wydawnictwo Prawo i Partnerstwo, Białystok: 2016, pp. 61–75.

[45] While the legislature has considerable discretion concerning the rights specified in Art. 41 of the Czech Charter, it is important to note that this discretion is not absolute. On this issue, *see e.g.* M. Tomoszek, *Commentary on Article 41*, in: F. Husseini, M. Bartoň, M. Kokeš, M. Kopa (eds.), *Listina základních práv a svobod. Komentář* [The Charter of Fundamental Rights and Freedoms: A Commentary], C.H. Beck, Praha: 2021, p. 1276; K. Šimáčková, *The Rights of the Elderly in the Case-Law of the Constitutional Court of the Czech Republic from the Perspective of Old-Age Pensions*, 10 Czech Yearbook of Public & Private International Law 248 (2019), pp. 252–255.

[46] CESCR, *General Comment No. 9 on the Domestic Application of the Covenant*, 3 December 1998 (E/C.12/1998/24), para. 14.

which conforms to a State's international legal obligations."[47] Specifically, if a provision within Czech or Polish legislation can be interpreted in multiple ways, the administrative court has the obligation to reject interpretations that could hinder the realisation of the ESC rights and favour the interpretation that most comprehensively supports the implementation of the ICESCR. This interpretative technique is consistent with General Comment No. 9 and complies with the limitation provisions established in the states' constitutional acts. Furthermore, it can mitigate the risk of denying the rights of certain groups of potential beneficiaries, who may struggle to ascertain their eligibility due to unclear provisions. In this way, the interpretation process can reinforce the principles of equality and non-discrimination.

b. Even when employing the interpretive technique outlined above, it is possible for the interpretative process to result in outcomes that are still debatable in relation to the ICESCR. To illustrate this concern, one could consider a hypothetical regulation under which parents are charged substantial fees by the Minister of Education for their children's primary education in public schools. Art. 13(2)(a) of the Covenant stipulates that primary education must be "compulsory and available free to all". Furthermore, according to General Comment No. 3, this provision is "capable of immediate implementation" by national courts.[48] Consequently, even if domestic statutes clearly mandate that parents pay such fees, the courts may regard the ICESCR provision as self-executing and potentially rule the actions of the Minister unlawful. It appears that at least some provisions of the ICESCR may be viewed as self-executing, owing to their sufficiently clear and specific wording.[49] Accordingly, under certain circumstances, administrative courts may refer directly to the Covenant, acknowledging its precedence over statutory regulations.[50]

The example regarding access to free primary education is relatively obvious. However, there may be instances where certain provisions within the Covenant are less explicit, such as Art. 13(2)(c), which states that "[h]igher education shall be made

[47] *Ibidem*, para. 15.

[48] CESCR, *General Comment No. 3 on the Nature of States Parties' Obligations*, 14 December 1990 (E/1991/23), para. 5

[49] CESCR, *General Comment No. 9 on the Domestic Application of the Covenant*, 3 December 1998 (E/C.12/1998/24), para. 11.

[50] This approach appears justified in light of the views expressed in the Polish and Czech literature. *See* A. Capik, A. Łazowski, *Komentarz do art. 91* [Commentary on Art. 91], in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom II. Komentarz do art. 87–243* [The Constitution of Poland. Vol. 2. Commentary on Articles 87–243], C.H. Beck, Warszawa: 2016; P. Mlsna, *Commentary on Article 10*, in: P. Rychetský, T. Langášek, T. Herc, P. Mlsna, *Ústava Ceske Republiky. Ústavní zákon o bezpečnosti České republiky. Komentář* [The Constitution of the Czech Republic. The Act on the Security of the Czech Republic: A Commentary], Wolters Kluwer, Praha: 2015, p. 110; K. Klíma, *Ústavní právo* [The Constitutional Law], Aleš Čeněk, Plzeň: 2016, p. 183.

equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." Such phrasing allows greater latitude to parliaments in implementing these provisions.[51] Consequently, the administrative courts must recognise that statutes play a significant role in realising these rights. Moreover, one cannot overlook that constitutional limitations may prevent claims that go "beyond" the laws that implement these provisions.

Nevertheless, it is crucial to highlight that, despite significant limitations, the constitutional courts in Poland and Czechia have developed methodologies for evaluating provisions that may conflict with the standards of ESC rights protection. The Czech Constitutional Court has employed a reasonableness test,[52] while the Polish Constitutional Court aims to determine whether a given right's essence (*Wesensgehalt*) has been undermined.[53] Thus, in instances of uncertainty, it is necessary that adjudicating bodies refer to the constitutional courts questions regarding domestic regulations' compatibility with the ICESCR.

Selecting an appropriate course of action, tailored to the specific circumstances of each case, is not merely a competence of administrative courts in Poland and Czechia; it is also a legal obligation under the ICESCR. Judges responsible for adjudicating cases related to ESC rights must not defer their responsibilities by asserting that the implementation of the Covenant is solely the domain of the legislative and executive branches. While the "adoption of legislative measures" referred to in Art. 2 of the Covenant is critical for enhancing the protection of these rights, it constitutes only one of several essential steps. Administrative courts, within the scope of their authority, are required to actively contribute to the progressive realisation of these rights.

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[51] On the controversies regarding this provision in the Swiss case law, *c.f.* A. Constantinides, *Economic and Social Rights*, in: A. Nollkaemper, A. Reinisch, R. Janik, F. Simlinger (eds), *International Law in Domestic Courts. A Casebook*, Oxford University Press, Oxford: 2018, pp. 659–661.

[52] *E.g.* M. Bartoň, *Úvod*. The Introduction, in: F. Husseini, M. Bartoň, M. Kokeš, M. Kopa (eds.), *Listina základních práv a svobod. Komentář* [The Charter of Fundamental Rights and Freedoms. A Commentary], C.H. Beck, Praha: 2021, pp. 52–53; M. Bartoň, J. Kratochvíl, M. Kopa, M. Tomoszek, J. Jirásek, O. Svaček, *Základní práva* [Fundamental Rights], Leges, Praha: 2016, pp. 100–107, 479–481; K. Koldinská, J. Pichrt, *Ústavněprávní aspekty ochrany základních sociálních práv* [The Constitutional Aspects of the Protection of Fundamental Social Rights], in: K. Koldinská (ed.), *Právo sociálního zabezpečení* [Social Security Law], C.H. Beck, Praha: 2022, p. 446. *But see* critical remarks in M. Antoš, *The Czech Constitutional Court and Social Rights: Analysis of the Case Law*, in: P. Šturma, N.L.X. Baez (eds.), *International and Internal Mechanisms of Fundamental Rights Effectiveness*, Právnická fakulta UK, Praha: 2015, pp. 187–196; J. Kratochvíl, *Test racionality: skutečně vhodný test pro sociální práva?* [The Reasonability Test: Really a Suitable Test for Social Rights?], 154(12) Právník 1052 (2015).

[53] *E.g.* Wyrzykowski, *supra* note 3, pp. 491–493. *See also* A. Ploszka, *The Right to Subsistence Minimum and Its Role in the Protection of People Living in Extreme Poverty – The Polish Experience*, 24 Comparative Law Review 225 (2018).

2. PRACTICES OF THE ADMINISTRATIVE JUSTICE SYSTEM

This section examines the practices of administrative courts regarding the enforcement of the ICESCR in Poland and Czechia. This examination is based on an extensive review of rulings sourced from two pertinent national databases: the one maintained by the Czech Supreme Administrative Court, which also includes decisions from lower-instance administrative courts,[54] and the Central Database of Administrative Court Decisions (CBOSA) in Poland.[55] The dataset encompasses every ruling referencing the ICESCR that has been made publicly accessible as of the end of 2024 (comprising a total of 262 rulings).[56] It is important to note that the timeframes for the research differ between the two countries. In Czechia, the earliest recorded decision is from 5 October 2003, whereas the oldest judgment in Poland dates back to 24 February 1989. This discrepancy arises from variations in the availability of data.[57]

A numerical comparison of the existing case law reveals several significant findings (see Tables 2 and 3). Some common trends, particularly regional variations, can be identified. Most of the courts in both countries have referenced the ICESCR only a few times over the extensive periods. Notably, the Polish administrative courts in Olsztyn and Opole have never invoked the Covenant. Overall, invoking the ICESCR appears to be an exceptional occurrence rather than a regular practice, even among the administrative courts that yielded the highest numbers in this comparison.

Table 2. The ruling of the administrative courts in Czechia

The name of the court	The number of rulings
The Supreme Administrative Court	82
The Municipal Court in Prague	18
The Regional Court in Brno	23

[54] *The Czech Supreme Administrative Court database*, Nejvyšší Správní Soud, available at: https://vyhledavac.nssoud.cz/ (accessed 30 June 2025).

[55] *The Polish Central Database of Administrative Court Decisions*, Naczelny Sąd Administracyjny, available at: https://orzeczenia.nsa.gov.pl/ (accessed 30 June 2025).

[56] Both databases are designed to provide open access to all the administrative courts' rulings. The Czech database has been available since 2010, but it also covers a majority of earlier rulings. If some of them are not available, it is due to technical obstacles, not intentional selection. A similar rule applies to the Polish database, which was created in 2007 to make all the rulings available to the public. In the case of Poland, there might be a small number of omissions, which is, however, not governed by any binding rules as to the selection procedures. The general idea of these databases is therefore to ensure access to complete (not selected) case law.

[57] The Czech SAC began operating in 2003.

The name of the court	The number of rulings
The Regional Court in České Budějovice	1
The Regional Court in Hradec Králové	8
The Regional Court in Ostrava	4
The Regional Court in Plzeň	3
The Regional Court in Prague	4
The Regional Court in Ústí nad Labem	7
In total:	**150**

Table 3. The rulings of the administrative courts in Poland

The name of the court	The number of rulings
The Supreme Administrative Court	30
The Voivodeship Administrative Court in Białystok	11
The Voivodeship Administrative Court in Bydgoszcz	1
The Voivodeship Administrative Court in Cracow	2
The Voivodeship Administrative Court in Gdańsk	2
The Voivodeship Administrative Court in Gliwice	3
The Voivodeship Administrative Court in Gorzów Wielkopolski	3
The Voivodeship Administrative Court in Kielce	1
The Voivodeship Administrative Court in Lublin	3
The Voivodeship Administrative Court in Łódź	8
The Voivodeship Administrative Court in Olsztyn	0
The Voivodeship Administrative Court in Opole	0
The Voivodeship Administrative Court in Poznań	2
The Voivodeship Administrative Court in Rzeszów	4
The Voivodeship Administrative Court in Szczecin	1
The Voivodeship Administrative Court in Warsaw	27
The Voivodeship Administrative Court in Wrocław	14
In total:	**112**

The provisions of the Covenant are invoked mostly by the courts of highest instance. However, despite the longer timeframe for Poland, instances of invoking the ICESCR are markedly less frequent. The Polish SAC referenced the Covenant in

only 30 of its rulings, while its Czech counterpart did so almost three times as often (82 cases), despite the shorter period. This discrepancy is also apparent when lower-instance administrative court rulings are included. The Czech Municipal Court in Prague (18 cases), the Regional Court in Brno (23 cases), the Polish Voivodeship Administrative Courts in Warsaw (27 cases) and Wrocław (14 cases) were among those which invoked the Covenant the most. Nevertheless, the number of references to the ICESCR by the Czech administrative courts still exceeds those reached in Poland. This notable difference remains striking, particularly in light of the fact that Poland's population is over three times larger, potentially influencing these outcomes.

While the practice of invoking the Covenant is subject to variation year by year (see Figures 1 and 2), the overarching trend is characterised by infrequent references from the administrative courts. In 2009 and 2012, the Polish SAC referred to the Covenant in three cases each year. This threshold was never exceeded in other years. As far as the Czech SAC is concerned, the highest number of references was noted in 2007 (11 cases). There have also been years when these highest-instance courts did not refer to the ICESCR at all – 2004 and 2017 (Czechia) and, for example, 2019, 2021 and 2023 (Poland).

Figure 1. The Polish Supreme Administrative Court rulings referencing the ICESCR (per year)

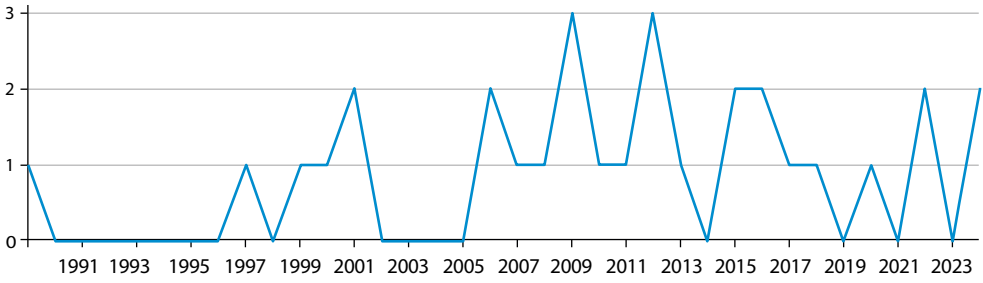
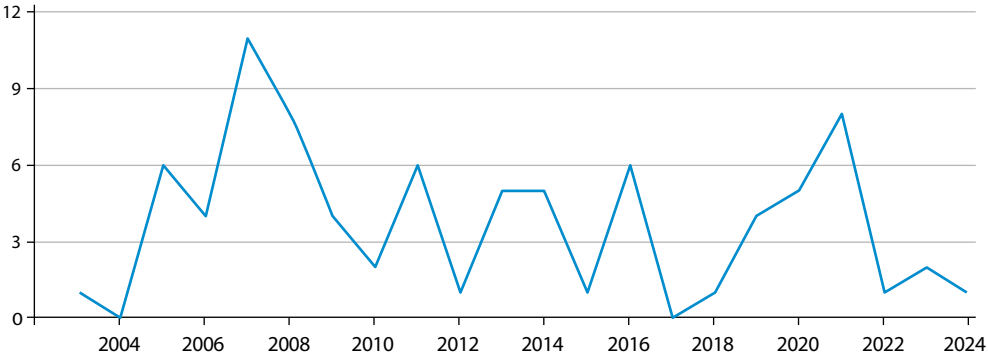


Figure 2. The Czech Supreme Administrative Court rulings referencing the ICESCR (per year)



Furthermore, additional insights emerge from the qualitative analysis of the available decisions. An interesting and consistent pattern is observed in the case law of both countries. In numerous instances, parties involved in proceedings referenced the Covenant; however, these arguments were often deemed unjustified by the adjudicating benches. This phenomenon is significant for two primary reasons. Firstly, it provides a new perspective on the previously discussed quantitative results, indicating that the actual number of cases where the Covenant influences the final decision is even lower than originally suggested. Secondly, this practice raises important questions regarding the rationale underlying court rulings.

The available rulings can be categorised into three primary groups based on the relevance of their references to the Covenant:

- group A includes rulings in which the ICESCR is mentioned in the arguments presented by the parties, but the court does not further elaborate on this reference in its later justification;
- group B encompasses cases where the court addresses the applicability of the Covenant, albeit briefly, but ultimately finds the arguments based on the reference to be unfounded;
- group C consists of a limited number of cases in which the Covenant was deemed relevant to the resolution of the case.

The analysis reveals that the majority of decisions fall within groups A and B (see Figures 3 and 4). The latter category exhibits diversity, as many cases merely touch upon the arguments related to the Covenant, while others delve deeper into the legal implications of the ICESCR. The former may initially appear to hold less cognitive value. However, its significant volume highlights important phenomena present in both jurisdictions. In certain instances, judges refrain from discussing the applicability of the Covenant, focussing instead on resolving cases based exclusively on domestic statutory regulations. However, this trend is more prevalent in the Polish judiciary.

Figure 3. The rulings referring the ICESCR issued by the Polish courts

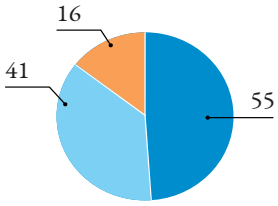
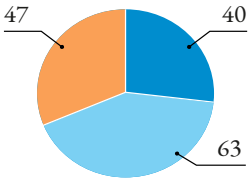


Figure 4. The rulings referring the ICESCR issued by the Czech courts



Group A – The ICESCR is mentioned in the arguments presented by the parties, but the court does not further elaborate on this reference.

Group B – The applicability of the ICESCR is addressed by the court, but the argument based on the reference is deemed unfounded.

Group C – The ICESCR is deemed relevant to the resolution of the case.

Notably, group C, despite constituting a relatively small category, offers valuable insights into the similarities and differences between Poland and Czechia regarding the enforcement of the Covenant. It is thus worth exploring these individual cases in detail. A qualitative analysis of the rulings within group C indicates that the Polish administrative courts have occasionally utilised the provisions of the Covenant as an auxiliary tool in the interpretation process. While it is hardly feasible to reconstruct the judges' specific interpretive methodology, it can be concluded that these references may serve to confirm the validity of the decisions rendered by the adjudicating benches. For instance, Art. 7(1) of the Covenant (the right to fair remuneration) was cited in three cases, alongside the analogous provision within Polish labour law, in assessing traineeship scholarships (*stypendium stażowe*), which were eventually considered equivalent to regular remuneration. In this context, the reference was clearly intended to validate the correctness of the decisions taken by the courts.[58]

A comparable approach to invoking the Covenant was evident in a case involving a mother who had received a fine for not ensuring her daughter's attendance at school. The court indicated that the national regulations regarding education were in accordance with international standards, specifically citing Art. 13(2)(a) ICESCR, which addresses compulsory primary education.[59] Similarly, Art. 12 of the Covenant, which guarantees the right of every individual to attain the highest standard of physical and mental health, was referenced as a foundational element in justifying several decisions regarding legal aid, which included exemptions from court fees and the provision of state-funded legal representation.[60]

The Polish SAC elaborated on the interpretation process in the resolution concerning the licensing of taxi drivers. The adjudicating bench explicitly recognised that the obligations associated with realising the right to work, as enshrined in Art. 6 of the Covenant, are not only imposed on legislators, but also on the entities responsible for interpreting and applying the law. Consequently, the court concluded that it is incumbent upon the judiciary to assess whether the implications of the

[58] Wyrok WSA w Rzeszowie [Judgment of the Voivodeship Administrative Court in Rzeszów], 28 October 2020, II SA/Rz 818/20, LEX 3088121; wyrok WSA w Poznaniu [Judgment of the Voivodeship Administrative Court in Poznań], 28 December 2017, II SA/Po 948/17, LEX 3088121; wyrok WSA w Poznaniu [Judgment of the Voivodeship Administrative Court in Poznań], 18 October 2017, II SA/Po 540/17, LEX 2390360.

[59] Wyrok WSA we Wrocławiu [Judgment of the Voivodeship Administrative Court in Wrocław], 4 January 2006, IV SA/Wr 175/04, LEX 836539.

[60] Postanowienie WSA w Warszawie [Decision of the Voivodeship Administrative Court in Warsaw], 15 May 2009, III SA/Wa 644/09, LEX 574036; postanowienie WSA w Warszawie [Decision of the Voivodeship Administrative Court in Warsaw], 20 November 2008, III SA/Wa 1879/04, LEX 988856; postanowienie WSA w Warszawie [Decision of the Voivodeship Administrative Court in Warsaw], 11 April 2008, III SA/Wa 558/08, LEX 1073037.

adopted legal interpretations impose undue restrictions on principles derived from international law.[61]

Furthermore, the activities of the Polish courts have extended beyond the previously outlined practices. Within group C, there are two cases in which a professional self-government body declined to register new legal trainees because of numerical limits imposed by the self-government. The SAC determined that these internal regulations contravened the "directly applied" Art. 6 ICESCR. Consequently, the court refused to enforce the regulations on the grounds of their incompatibility with the Covenant.[62] Notably, these are the only instances in which a Polish administrative court explicitly acknowledged the possibility of not applying provisions that manifest a clear non-compliance with the ICESCR.

When comparing the rulings of the Polish courts to those from the Czech judiciary, certain parallels are undisputed. The Czech courts have also referred to specific provisions of the ICESCR in their justifications as a way of bolstering the validity of the rulings, such as in one case concerning a fine imposed on an employer (*zaměstnanosti pokuta*), in which the court's justification invoked Art. 7(b) of the Covenant (the right of safe and healthy conditions of work).[63] On several occasions, the adjudicating benches also adduced quotes from the Czech Constitutional Court which contain explicit references to the Committee's General Comment No. 5.[64] This argument proved useful while discussing the extent of the state's obligation towards people with disabilities.[65]

Interestingly, some references encountered in the Czech case law do not even concern the very essence of specific cases. For example, in two judgments concerning expulsion from Czech territory, the Municipal Court in Prague mentioned that Uzbekistan is a party to the ICESCR. This circumstance was relevant to evaluating the ongoing situation in an individual's country of origin.[66] In another case, an

[61] Uchwała NSA [Resolution of the Supreme Administrative Court], 13 October 2011, II GPS 1/11, LEX 951321. This view was later cited in wyrok WSA w Szczecinie [Judgment of the Voivodeship Administrative Court in Szczecin], 14 December 2011, II SA/Sz 931/11, LEX 1134906.

[62] Wyrok NSA [Judgment of the Supreme Administrative Court], 23 March 1999, II SA 202/99, LEX 46730; wyrok NSA [Judgment of the Supreme Administrative Court], 22 May 2000, II SA 2725/99, LEX 654789.

[63] Rozsudek Krajského soudu v Hradci Králové – pobočka v Pardubicích [Judgment of the Regional Court in Hradec Králové – Branch in Pardubice], 19 March 2018, 52 Ad 12/2017-89, para. 36.

[64] CESCR, *General Comment No. 5 on Persons with Disabilities*, 9 December 1994 (E/1995/22), para. 34.

[65] Rozsudek Krajského soudu v Ostravě – pobočka v Olomouci [Judgment of the Regional Court in Ostrava – Branch in Olomouc], 30 October 2020, 72 Ad 17/2019-24, para. 54; Rozsudek Krajského soudu v Ostravě – pobočka v Olomouci [Judgment of the Regional Court in Ostrava – Branch in Olomouc], 31 January 2020, 72 Ad 44/2018-28, para. 50; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 25 April 2019, 8 Ads 271/2018-34, para. 34.

[66] Rozsudek Městského soudu v Praze [Judgment of the Municipal Court in Prague], 15 June 2018, 13 A 69/2018-24, para. 25; Rozsudek Městského soudu v Praze [Judgment of the Municipal Court in Prague], 25 June 2018, 13 A 56/2018-27, para. 15.

adjudicating bench noted some similarities between the Paris Agreement and the Covenant and eventually examined the latter to provide an argument from analogy.[67]

A qualitative analysis of the Czech case law reveals that over the study period, the ICESCR was expressly considered useful for interpretation in only a severely limited number of cases. To some extent Art. 13(4) of the Covenant, which is aimed at preventing "interfering with the liberty of individuals and bodies to establish and direct educational institutions", influenced the interpretation of domestic regulations on establishing non-state schools, because the SAC ruled in favour of an applicant who referred to the necessity of interpreting a provision of the Education Act (*Školský zákon*) and a long-term plan for education adopted at the regional level in alignment with Czechia's binding international obligations, including those arising from the ICESCR, which ultimately led the Court to the conclusion that the domestic regulations cannot be interpreted in such a way that they allow the minister to prevent the registration of a private school simply because local schools have sufficient spare capacity to admit additional pupils.[68] Conversely, the right to housing, enshrined in Art. 11(1) of the Covenant, was used more explicitly as an interpretative context in numerous cases regarding the interpretation of tax law.[69]

The higher volume of references to the ICESCR in Czechia stems mainly from the fact that the parties to the proceedings strive (usually unsuccessfully) to strengthen their viewpoints by making practical use of human rights treaties.[70] This same phenomenon persists, to a lesser extent, in the Polish judiciary. Although it is impossible to fully understand the rationale behind the decisions allocated to group A, the decisions in group B give a slightly broader perspective on this issue. The fact is that the parties' arguments often appear misguided, such as in a case concerning

[67] Rozsudek Městského soudu v Praze [Judgment of the Municipal Court in Prague], 15 June 2022, 14 A 101/2021-248, paras. 260–261.

[68] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 7 December 2022, 10 As 320/2020-58, paras. 16, 34, 58, 65; Rozsudek Městského soudu v Praze [Judgment of the Municipal Court in Prague], 13 May 2020, 10 A 148/2018-65, paras. 41 and 55.

[69] *E.g.* Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 28 August 2007, 2 Afs 212/2006-147; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 19 September 2007, 1 Afs 143/2006-68; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 16 April 2008, 1 Afs 62/2008-93; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 22 March 2013, 5 Afs 71/2012-37.

[70] *E.g.* cases involving parties that invoked the Covenant in the asylum proceedings: Rozsudek Krajského soudu v Hradci Králové [Judgment of the Regional Court in Hradec Králové], 8 April 2016, 32 Az 20/2015-43; Rozsudek Krajského soudu v Hradci Králové [Judgment of the Regional Court in Hradec Králové], 30 May 2017, 43 Az 26/2016-57; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 15 February 2021, 4 Azs 325/2020-29; Rozsudek Krajského soudu v Plzni [Judgment of the Regional Court in Plzeň], 9 April 2021, 60 Az 8/2021-25, para. 7.

a convicted person who referred to the Covenant in an attempt to safeguard their right to take up entrepreneurial activity in road transport.[71]

It is still possible to uncover some interesting considerations in group B. To provide an example, while resolving one case concerning a care allowance, the Polish Supreme Administrative Court expressed the view that the norms enshrined in Art. 9 (the right to social security) and Art. 11(1) of the Covenant (the right to an adequate standard of living) are merely programmatic and cannot be directly applied.[72] Another administrative court in Poland highlighted – in as many as three cases – that the Covenant only sets out goals in the field of social aid and that the entitlements should be substantiated in national law.[73] These views correspond to the notions encountered in the Czech case law, such as the conclusion that the rights contained in the Covenant are programmatic and depend on the approach adopted by the legislature.[74]

While the adoption of legislative measures definitely remains a key step in the realisation of ESC rights, the adduced views might suggest that the burden is only on the legislative bodies. This kind of approach would be irreconcilable with the guidelines contained in General Comment No. 9, which clearly highlights that every Covenant right possesses "at least some significant justiciable dimension." In reality, the administrative courts in both jurisdictions have occasionally endeavoured to utilise the provisions of the ICESCR, thereby contributing to the full realisation of these rights. Such cases, unfortunately, are extremely scarce from the perspective of the wide time ranges adopted in the present study.

The number of decisions in which administrative courts in Czechia invoked the Covenant in ways that impacted the outcome of the cases is higher than in Poland. The above-presented examples do not confirm, however, the existence of a significant qualitative discrepancy between the attitudes adopted by the administrative courts in Poland and Czechia as to the enforcement of the ICESCR. Very similar lines of reasoning are evident in group C (on the interpretation process and direct applicability). What is particularly important is that the Czech courts expressed their

[71] Wyrok WSA w Gliwicach [Judgment of the Voivodeship Administrative Court in Gliwice], 23 September 2009, II SA/Gl 582/09, LEX 631009; wyrok NSA [Judgment of the Supreme Administrative Court], 8 December 2010, II GSK 4/10, LEX 686784.

[72] Wyrok NSA [Judgment of the Supreme Administrative Court], 1 March 2017, I OSK 2163/15, LEX 2277807.

[73] Wyrok WSA we Wrocławiu [Judgment of the Voivodeship Administrative Court in Wrocław], 10 July 2008, IV SA/Wr 194/08, LEX 1077360; wyrok WSA we Wrocławiu [Judgment of the Voivodeship Administrative Court in Wrocław], 10 July 2008, IV SA/Wr 193/08, LEX 509288; wyrok WSA we Wrocławiu [Judgment of the Voivodeship Administrative Court in Wrocław], 10 July 2008, IV SA/Wr 192/08, LEX 509353.

[74] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 27 September 2016, 1 Ads 92/2016-23, para. 20; Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 27 September 2016, 1 Ads 94/2016-20, para. 19.

considerations on these matters more often, but – taking into account the overall number of cases adjudicated in administrative courts – these are still small numbers.

Surprisingly, the examination did not reveal significant discrepancies between the Czech and Polish courts in the way of adjudicating cases relating to ESC rights, although the concluding observations of the Committee, presented in the introductory part, implied otherwise. Indeed, it can be established that the ICESCR has been invoked far more frequently by the parties in Czechia. Nonetheless, this fact has not resulted in a qualitative change in terms of judicial treatment of the Covenant. The research even identified considerable similarities between these two legal orders. In both countries, the administrative courts rarely elaborate on the "justiciable dimensions" of Covenant rights in the justifications of their rulings, and when eventually discussing such dimensions they resort to indicating the "non-self-executing" and "programmatic" character of the provisions. Thus, the issue of judicial enforcement of ESC rights becomes easily simplified, which may lead to the parties becoming confused as to whether or not the ICESCR can be successfully invoked before the courts.

One could potentially assume that in these cases there were grounds for considering that the norms expressed in the Covenant were programmatic. However, this premise is unjustified because every right expressed therein has a "justiciable dimension". The presumption that some of these rights are justiciable and others are not would be incompatible with the nature of these norms. The provisions of the ICESCR might still be deemed irrelevant if they do not apply to a given situation. It can also occur that the individuals were attempting to derive unreasonable legal consequences from these provisions. However, this does not change the fact that every provision should be read in a way that can support the judicial enforcement of the rights. As outlined above, some administrative courts have made efforts to include the Covenant in the adjudication process, while others have largely omitted the potential of ESC rights for judicial practice.

3. FINDING BETTER METHODS OF ACHIEVING THE FULL REALISATION OF ESC RIGHTS

Based on the practices of the administrative courts in Poland and Czechia presented herein, it would be hard to argue that they have used all the available "appropriate means" to progressively achieve "the full realization" of the rights recognised in the Covenant.[75] One of the factors that can potentially affect the approaches taken by the national courts is the fact that state authorities might tend to overtly question

[75] As described in Art. 2 of the Covenant.

the justiciability of ESC rights. To some extent, these reluctant approaches can be traced based on the statements provided in reports submitted to the Committee by the states parties. To provide an example, in the 2008 report, the Polish authorities referred to the ruling issued by the Polish Supreme Court on 8 February 2000, in which it was explicitly stated that "parties to national proceedings might not directly invoke the rights under the Covenant."[76] It was also highlighted that the ICESCR is not directly applied by the Polish common courts.[77] Although the Polish authorities did not directly elaborate on the attitudes of judges adjudicating in administrative courts, the statements presented within the reporting procedures provide some context on how the justiciability of these rights might be perceived in the domestic legal system.

Interestingly, the concept of judicial enforcement was not explicitly undermined in the reports submitted by Czechia. In 2001, the state authorities declared that the rights recognised under the ICESCR are protected primarily through constitutional complaints, which can be submitted to the Czech Constitutional Court.[78] Most recently, Czechia underscored that ESC rights receive "the same level of protection as other fundamental rights and freedoms"[79] and that the priority of the Covenant is guaranteed by the possibility of the Constitutional Court repealing contested provisions in case of non-conformity.[80] Although these statements do not fully correspond to the actual chances of enforcing ESC rights in practice, they might reflect a greater willingness of the Czech administrative courts to discuss arguments concerning the Covenant.

Multiple deficiencies in the judicial enforcement of the ICESCR might be exacerbated by the rather general wording of the respective provisions of international treaties. However, over the years, the national courts of Poland and Czechia have successfully referred in their case law to international human rights law, especially the European Convention on Human Rights.[81] This indicates that domestic courts are still willing to engage in the judicial treatment of international law, even though referring to it can pose challenges. In the case of the ICSECR, the limitation provisions in the constitutional acts and the efforts to safeguard the separation of powers

[76] The fifth periodic report submitted by Poland on the implementation of the International Covenant on Economic, Social and Cultural Rights, 4 August 2008 (E/C.12/POL/5), para. 853.

[77] *Ibidem*, para. 854.

[78] The initial report submitted by the Czech Republic on the implementation of the International Covenant on Economic, Social and Cultural Rights, 25 May 2001 (E/1990/5/Add.47), para. 51.

[79] The third report submitted by Czechia on the implementation of the International Covenant on Economic, Social and Cultural Rights, 2 December 2019 (E/C.12/CZE/3), para. 4.

[80] *Ibidem*, para. 5.

[81] D. Kosař, K. Šipulová, H. Smekal, L. Vyhnánek, J. Janovský, *Domestic Judicial Treatment of European Court of Human Rights Case Law: Beyond Compliance*, Routledge, Milton Park: 2020, pp. 81–232; A. Wiśniewski, *The Impact of the European Convention of Human Rights on the Polish Legal System*, 9(1) Polish Review of International and European Law 153 (2020), pp. 160–162.

when it comes to realising ESC rights additionally increase these difficulties. Nonetheless, there are methods that can help to enhance the enforcement of the ICESCR

The impediments to judicial enforcement of ESC rights in Czechia and Poland can be easily attributed to the constitutional provisions which make these clauses subject to criticism: Art. 81 of the Polish Constitution and Art. 41 of the Czech Charter.[82] Certainly, these provisions can increase the judges' and the parties' uncertainty regarding the scope in which the Covenant rights can be enforced before the courts. This is itself one of the worthy arguments for derogating these limitation provisions. However, any amendment in that regard would require a consensus of many political actors, which does not necessarily appear feasible. For this reason, it is justified to concentrate solely on the methods that remain within the competencies of the administrative courts.

The results outlined in Section 2 describe the first core problem – the relative scarcity of references to the ICESCR in the existing case law. This shortcoming is rather puzzling. Certainly, the administrative courts take decisions that affect the protection of ESC rights on a regular basis, even when relying mostly on statutory provisions. However, they do not necessarily acknowledge their role in enforcing the Covenant, which clearly arises from the prior analysis. This state of affairs can perpetuate the limited awareness of the Covenant among the judiciary, and can even lower awareness among the rightsholders.[83] It is therefore essential that the respective provisions of the ICESCR are invoked in the decisions each time the court adjudicates a case that can potentially influence the parties' ESC rights (even if the party did not invoke the Covenant). Such a systematic change in the approach could bring about several positive effects:

a. raising awareness among the parties and the general public of the Covenant rights
b. ensuring the parties and the general public that a court has considered the international human rights standards while resolving a case
c. making the administrative courts more "sensitive" to problems concerning the protection of ESC rights.

These references can matter even if an adjudicating bench is convinced that the final decision would remain the same without referring to international law. This

[82] *E.g.* Z. Kędzia, *Do We Need to Revise the Constitutional Charter of Rights?*, 80(1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 61 (2018), p. 76; CESCR, *Concluding observations on the third periodic report of Czechia* (E/C.12/CZE/CO/3), para. 4.

[83] Over the years, the insufficient awareness of the Covenant has been classified as one of the primary concerns in the concluding observations of the Committee, and the recommendations often concentrate on raising this level of awareness. *E.g.* CESCR, *Concluding observations on the sixth periodic report of Poland* (E/C.12/POL/CO/6), paras. 5–6; CESCR, *Concluding observations on the third periodic report of Czechia* (E/C.12/CZE/CO/3), paras. 4–5.

practice can make it clear that deciding a case based on, for example, the statutory provisions on health care, is also a way of safeguarding the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health", as outlined in Art. 12(1) ICESCR. However, the references to the Covenant rights should not be merely some "ornaments" added by the adjudicating court in its justification after the actual decision has been reached. These rights must be taken into account in the process of interpreting statutes and other acts adopted by the national authorities, as described in Section 1.

It would also be advisable that the administrative courts elaborate in their rulings on the extent to which the norms enshrined in the Covenant can be considered self-executing. While the obligation to take "steps" to achieve the full realisation of ESC rights rests primarily with the national parliaments, the court can still acknowledge that the ICESCR provisions are self-executing in some aspects. The opposite approach would be hard to reconcile with General Comment No. 9. The most difficult issue is determining the extent of this self-executing character of the Covenant. I would argue that all provisions of the Covenant may be deemed self-executing, in that they impose the obligation on the courts to take necessary steps within the limits of their competencies to protect the "minimum core" of the Covenant rights.[84] If the national law clearly infringes this core, the administrative court may be required to refuse to apply the respective national provisions. Such a "minimum core" approach should still be consistent with the obligations stemming from Art. 81 of the Polish Constitution and Art. 41 of the Czech Charter. The administrative courts are therefore obliged to take into account how these rights have been realised by the legislative bodies, thereby accepting a wider margin of appreciation as to the statutory framework in that regard. But if the law clearly deprives the individuals of the very core of their rights, the courts can rely on the ICESCR, acknowledging the precedence of international agreements before the statutes.[85]

Alternatively, the administrative courts should, at any time, consider referring the questions to the constitutional courts, which for years has been a rare practice as far as compliance with the ICESCR is concerned. In the case of Poland, this solution would not be currently effective due to serious doubts as to the lawfulness of the constitutional court.[86] In view of the fact that these doubts persist, the Polish

[84] *See generally* K.G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, (33)1 Yale Journal of International Law 113 (2008); Langford, King *supra* note 8, pp. 492–495.

[85] This approach is still compatible with some views arising in the Czech case law; *e.g.* Rozsudek Krajského soudu v Brně [Judgment of the Regional Court in Brno], 10 October 2018, 33 Az 2/2018-53, para. 31. However, there is still little evidence of an actual acknowledgement by the administrative courts that some national legislation is incompatible with international obligations arising from the Covenant.

[86] *E.g.* ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (App. No. 4907/18), 7 May 2021, paras. 290–291; ECtHR, *M.L. v. Poland* (App. No. 40119/21), 14 December 2023, paras. 173–174.

administrative courts may even consider abstaining from referring the questions to the body whose lawfulness is being questioned, and instead review the conformity of a given regulation with the ICESCR themselves.[87]

Last but not least, an underlying reason for the lingering attitudes of the administrative courts in Poland and Czechia towards the ICESCR seems to be a widespread view that the "matters involving the allocation of resources should be left to the political authorities rather than the courts." This notion is reasonably disputed by the Committee,[88] but has not yet been disputed so overtly by the administrative courts in both countries. As a matter of fact, it is overlooked that a substantial number of court rulings eventually cause the allocation or reallocation of resources. This is also the case when the courts interpret the national law in a way which conforms to international standards. Whether explicitly acknowledged or not, interpretations adopted by the administrative courts might, one way or another, influence public expenditures. It seems that accepting this existing influence can make the administrative courts more inclined to engage in deliberations on the extent of obligations stemming from the ICSECR, which has certainly been lacking for years in both jurisdictions.

The shift in the approaches taken by the administrative courts cannot be achieved without providing two cornerstones: adequate training for judges and increased awareness about the ICESCR among lawyers and the general public. The UN Committee has repeatedly recommended both Poland and Czechia to intensify efforts in this regard, which can be clearly seen from the subsequent concluding observations.[89] It must be still acknowledged that over the last decade, some steps have been taken in both countries. According to the third periodic report of Czechia, the Judicial Academy organised seminars on ESC rights for judges, prosecutors, assistants of judges, prosecutor assistants, trainee judges and trainee prosecutors.[90] Selected aspects of ESC rights protection are also covered during training courses organised by the Polish National School for the Judiciary and Public Prosecution.[91]

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[87] *See generally* P. Chybalski, *The Problem of the So-called Dispersed Judicial Review of Parliamentary Acts in Poland – Traditions and Current Perspectives*, in: M. Granat (ed.), *Constitutionality of Law without a Constitutional Court*, Routledge, London: 2023, pp. 48–64.

[88] *See also* Kratochvíl, *supra* note 31, pp. 1167–1669.

[89] CESCR, *Concluding observations on the third periodic report of Czechia* (E/C.12/CZE/CO/3), para. 5; CESCR, *Concluding observations on the second periodic report of the Czech Republic,* (E/C.12/CZE/CO/2), para. 5; CESCR, *Concluding observations on the initial report of the Czech Republic* (E/C.12/1/Add.76), para. 45; CESCR, *Concluding observations on the seventh periodic report of Poland* (E/C.12/POL/CO/7), para. 5; CESCR, *Concluding observations on the sixth periodic report of Poland* (E/C.12/POL/CO/6), para. 6; CESCR, *Concluding observations on the fifth periodic report of Poland* (E/C.12/POL/CO/5), paras. 9–10; CESCR, *Concluding observations on the fourth periodic report of Poland* (E/C.12/1/Add.82), paras. 33, 56.

[90] The third periodic report submitted by Czechia on the implementation of the International Covenant on Economic, Social and Cultural Rights, 2 December 2019 (E/C.12/CZE/3), para. 7.

[91] The seventh periodic report submitted by Poland on the implementation of the International Covenant on Economic, Social and Cultural Rights, 3 December 2021 (E/C.12/POL/7), para. 2.

In 2018, the first Polish-language commentary on the ICESCR was published.[92] The translation of the 2016 concluding observations was issued by the Polish Office of the Commissioner for Human Rights.[93] Nevertheless, the findings of the UN Committee are not widely discussed in Poland. The last report concerning Poland received only limited media coverage.[94] A similar issue concerning low awareness arises in Czechia. While there are some publications describing the Committee's activity aimed at the general public, the fact that the concluding observations are not consistently translated into Czech might create a significant barrier in the implementation process.[95] The efforts of national human rights institutions, NGOs and the academic community are further hindered by the long-standing lack of coherent strategies among the Polish and Czech executives in promoting the ICESCR, which is also reflected in the failure to ratify the Optional Protocol to the Covenant.[96]

Enhancing the quality and intensity of judicial training on ESC rights and raising awareness about the significance of the Covenant can be rightly seen as prerequisites for any developments in the ways in which members of the judiciary invoke the ICESCR. It is, therefore, reasonable to infer that the changes in the judicial treatment of this international agreement can be induced not only by judges, but also by other actors, such as NGOs disseminating the findings of the UN Committee, ombudspersons releasing statements on the potential of judicial enforcement of ESC rights and attorneys consistently invoking the provisions before the administrative courts.

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[92] Z. Kędzia, A. Hernandez-Połczyńska (eds.), *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych. Komentarz* [International Covenant on Economic, Social and Cultural Rights: A Commentary], C.H. Beck, Warszawa: 2018.

[93] Rekomendacje Komitetu Praw Gospodarczych, Społecznych i Kulturalnych ONZ dotyczące Polski [The Recommendations of the UN Committee on Economic, Social and Cultural Rights Concerning Poland], available at https://bip.brpo.gov.pl/pl/node/8934/revisions/8985/view (accessed 30 June 2025).

[94] A. Ploszka, *Lista hańby. Komitet ONZ wskazuje, jak poprawić ochronę praw społecznych w Polsce* [The List of Shame: The UN Committee Indicates How to Improve the Protection of Social Rights in Poland], OKO.press, 21 October 2024, available at https://oko.press/komitet-onz-wskazuje-jak-poprawic-ochrone-praw-spolecznych (accessed 30 June 2025).

[95] V. Nováková, *Jak se daří ČR naplňovat Mezinárodní pakt o hospodářských, sociálních a kulturních právech?* [How Is the Czech Republic Dealing with Implementing the International Covenant on Economic, Social and Cultural Rights?], Centrum pro lidská práva a demokracii, 29 July 2022, available at https://www.centrumlidskaprava.cz/jak-se-dari-cr-naplnovat-mezinarodni-pakt-o-hospodarskych-socialnich-kulturnich-pravech (accessed 30 June 2025); *Mezinárodní pakt o hospodářských, sociálních a kulturních právech* [The International Covenant on Economic, Social and Cultural Rights], Viáda České republiky, 6 November 2006, available at https://vlada.gov.cz/cz/ppov/rlp/dokumenty/zpravy-plneni-mezin-umluv/mezinarodni-pakt-o-hospodarskych--socialnich-a-kulturnich-pravech-19856/ (accessed 30 June 2025).

[96] Ratification Status for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx (accessed 30 June 2025).

CONCLUSIONS

Even though the UN Committee has evaluated the domestic application of the Covenant by the Czech courts more favourably than the activities of their Polish counterparts, this study leads to the conclusion that, in reality, members of the Czech administrative justice system have not developed distinctive methods for adjudicating cases related to ESC rights. Undeniably, parties to the proceedings before the Czech administrative courts are slightly more inclined to invoke the provisions of the ICESCR, and the Czech judges have more frequently addressed references to the international obligations arising from this agreement. However, this apparent trend does not translate into different approaches to judicial treatment of the Covenant in the two jurisdictions. Although the study covered all the rulings available in public databases, identifying an established practice of directly applying the Covenant poses significant challenges. Over the years, the adjudicating benches only occasionally used its provisions as an aid in interpreting national legislation.

The limitation provisions in the constitutional acts of both countries (Art. 81 of the Polish Constitution and Art. 41 of the Czech Charter) certainly make it more difficult to enforce rights recognised in the Covenant. This does not mean, however, that they are excluded from judicial protection. There are still multiple "steps" that administrative courts can and must take to progressively foster the full realisation of ESC rights. The first step might be to realise that their day-to-day practice involves resolving many cases concerning these rights. Invoking relevant rights in their justifications, at least to provide an interpretive background, will be indispensable any time a given right is at stake. Subsequently, it might be necessary to consider one of the actions available within the courts' competencies, such as relying on a self-executing provision if the core of a given right is endangered, or referring a problematic issue to the constitutional court. In any event, what should not be lacking is more engagement of the courts with deliberations on the extent of obligations arising from the ICESCR. Otherwise, the domestic application of the Covenant will still be listed as one of the primary areas of concern in Poland and Czechia.

The research also revealed that despite the high cognitive and practical value of the Committee's concluding observations, as secondary resources, they provide only limited insight into the practices of national authorities. It might therefore prove crucial to juxtapose the data already collected by the UN bodies with primary resources derived from specific jurisdictions. The remarks contained herein can thereby contribute to improving future research on ESC rights.

Appendix 1.

Grupa A (Poland)			
Date	**Court**	**Case number**	**Subject**
5 September 2024	The Voivodeship Administrative Court in Gorzów Wielkopolski	I SA/Go 130/24	property tax
5 September 2024	The Voivodeship Administrative Court in Gorzów Wielkopolski	I SA/Go 131/24	property tax
5 September 2024	The Voivodeship Administrative Court in Gorzów Wielkopolski	I SA/Go 132/24	property tax
26 April 2023	The Voivodeship Administrative Court in Warsaw	VII SA/Wa 325/23	appointment of a theatre director
16 April 2022	The Supreme Administrative Court	III OSK 3754/21	social security benefits for former officials of the People's Republic of Poland
14 September 2022	The Voivodeship Administrative Court in Kielce	II SA/Ke 295/22	removal from the register of residents
15 September 2020	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 539/20	outcome of the entrance examination for notarial training
23 March 2020	The Voivodeship Administrative Court in Warsaw	II SA/Wa 2460/19	habilitation proceedings
19 September 2019	The Voivodeship Administrative Court in Warsaw	II SA/Wa 669/19	social security benefits for former officials of the People's Republic of Poland
22 September 2017	The Voivodeship Administrative Court in Lublin	I SA/Lu 428/17	remission of tax arrears
15 November 2016	The Voivodeship Administrative Court in Warsaw	I SA/Wa 1388/16	child benefits
5 April 2016	The Voivodeship Administrative Court in Warsaw	II SAB/Wa 1012/15	access to public information
8 March 2016	The Voivodeship Administrative Court in Warsaw	IV SA/Wa 3315/15	temporary residence for a foreign national
1 April 2015	The Supreme Administrative Court	I OSK 2774/14	habilitation proceedings
4 September 2014	The Voivodeship Administrative Court in Gliwice	IV SA/Gl 1119/13	tuition fees

Grupa A (Poland)			
Date	**Court**	**Case number**	**Subject**
12 September 2012	The Voivodeship Administrative Court in Rzeszów	II SA/Rz 559/12	care allowance
26 June 2012	The Supreme Administrative Court	II GSK 805/11	financial assistance for supporting farming
19 June 2012	The Voivodeship Administrative Court in Warsaw	VII SA/Wa 437/12	products with psychoactive effects
23 May 2012	The Supreme Administrative Court	I OSK 2179/11	family allowance
23 May 2012	The Voivodeship Administrative Court in Warsaw	VII SA/Wa 2906/11	products with psychoactive effects
16 May 2012	The Voivodeship Administrative Court in Warsaw	VII SA/Wa 2824/11	products with psychoactive effects
27 October 2009	The Supreme Administrative Court	II GSK 123/09	financial assistance for supporting farming
3 September 2009	The Voivodeship Administrative Court in Białystok	II SA/Bk 374/09	care allowance (question to the Constitutional Court)
3 September 2009	The Voivodeship Administrative Court in Białystok	II SA/Bk 373/09	care allowance (question to the Constitutional Court)
2 September 2009	The Voivodeship Administrative Court in Bydgoszcz	II SA/Bd 526/09	unemployment benefit
3 December 2008	The Voivodeship Administrative Court in Białystok	I SA/Bk 347/08	financial assistance for supporting farming
23 September 2008	The Supreme Administrative Court	I OSK 1511/07	periodical benefit
27 April 2007	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 95/07	periodical benefit
27 April 2007	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 96/07	targeted benefits
23 April 2007	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 73/07	registering as a solicitor
20 April 2007	The Supreme Administrative Court	I OSK 989/06	discharge from prison service

Grupa A (Poland)			
Date	**Court**	**Case number**	**Subject**
4 April 2007	The Voivodeship Administrative Court in Łódź	III SA/Łd 279/06	housing allowance
21 December 2006	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 795/06	periodical benefit
21 December 2006	The Voivodeship Administrative Court in Łódź	III SA/Łd 410/06	housing allowance
12 December 2006	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 794/06	periodical benefit
4 July 2006	The Voivodeship Administrative Court in Łódź	III SA/Łd 333/06	housing allowance
4 July 2006	The Voivodeship Administrative Court in Łódź	III SA/Łd 332/06	housing allowance
20 April 2006	The Supreme Administrative Court	I OSK 758/05	housing allowance
19 April 2006	The Voivodeship Administrative Court in Gdańsk	III SA/Gd 258/04	housing allowance
29 March 2006	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 78/05	targeted benefits
26 January 2006	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 1978/05	registering asa solicitor
7 September 2005	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 593/05	registering new legal trainees
28 July 2005	The Voivodeship Administrative Court in Wrocław	II SA/Wr 2277/03	periodical benefit
5 April 2005	The Voivodeship Administrative Court in Łódź	III SA/Łd 721/04	housing allowance
16 March 2005	The Voivodeship Administrative Court in Łódź	II SA/Łd 1712/03	targeted benefits
14 March 2005	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 891/04	registering new legal trainees
1 March 2005	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 908/04	registering new legal trainees
23 December 2004	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 909/04	registering new legal trainees
4 August 2004	The Voivodeship Administrative Court in Warsaw	II SA 3690/02	registering new legal trainees
21 July 2004	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 890/04	registering new legal trainees

Grupa A (Poland)			
Date	**Court**	**Case number**	**Subject**
1 July 2004	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 749/04	registering new legal trainees
15 April 2004	The Voivodeship Administrative Court in Gdańsk	II SA/Gd 2301/01	unemployment benefit
17 May 2001	The Supreme Administrative Court	I SA/Po 480/00	payment with pre-war bonds (tax law)
2 April 2001	The Supreme Administrative Court	II SA 2692/99	registering new legal trainees
24 February 1989	The Supreme Administrative Court	I SA 1104/88	establishing schools

Group B (Poland)			
Date	**Court**	**Case number**	**Subject**
14 June 2024	The Supreme Administrative Court	II GSK 708/21	outcome of the entrance examination for notarial training
19 January 2024	The Supreme Administrative Court	I OSK 2429/22	care allowance
6 September 2022	The Voivodeship Administrative Court in Rzeszów	II SA/Rz 430/22	care allowance
17 May 2022	The Voivodeship Administrative Court in Lublin	III SA/Lu 60/22	vacating a service quarter
8 February 2022	The Supreme Administrative Court	I OSK 1036/21	care allowance
3 February 2021	The Voivodeship Administrative Court in Rzeszów	II SA/Rz 1149/20	care allowance
25 November 2020	The Supreme Administrative Court	I OSK 1472/20	care allowance
28 October 2020	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 227/20	unemployment benefit
22 November 2019	The Voivodeship Administrative Court in Warsaw	II SA/Wa 1228/19	social security benefits for former officials of the People's Republic of Poland
20 December 2018	The Supreme Administrative Court	II OSK 627/17	removal from the register of residents
1 March 2017	The Supreme Administrative Court	I OSK 2163/15	care allowance
23 November 2016	The Voivodeship Administrative Court in Cracow	III SA/Kr 1653/15	removal from the register of residents

Group B (Poland)			
Date	**Court**	**Case number**	**Subject**
17 May 2016	The Supreme Administrative Court	II GSK 2844/14	results of the bar examination
14 April 2016	The Supreme Administrative Court	I OSK 2493/14	vacating residential premises
24 July 2014	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 526/14	results of the bar examination
4 April 2013	The Supreme Administrative Court	I OSK 918/12	discharge from the Internal Security Agency
23 May 2012	The Supreme Administrative Court	I OSK 2226/11	care allowance
20 December 2011	The Voivodeship Administrative Court in Warsaw	II SA/Wa 1980/11	discharge from the Internal Security Agency
21 June 2011	The Voivodeship Administrative Court in Lublin	III SA/Lu 138/11	scholarship for PhD students
21 January 2011	The Voivodeship Administrative Court in Białystok	I SA/Bk 252/10	financial assistance for supporting farming
8 December 2010	The Supreme Administrative Court	II GSK 4/10	licensing of drivers
10 March 2010	The Voivodeship Administrative Court in Białystok	I SA/Bk 585/09	financial assistance for supporting farming
23 September 2009	The Voivodeship Administrative Court in Gliwice	II SA/Gl 582/09	licensing of drivers
27 May 2009	The Supreme Administrative Court	I OSK 958/08	care allowance
27 May 2009	The Supreme Administrative Court	I OSK 957/08	family benefit
3 December 2008	The Voivodeship Administrative Court in Białystok	I SA/Bk 332/08	financial assistance for supporting farming
29 October 2008	The Voivodeship Administrative Court in Białystok	I SA/Bk 333/08	financial assistance for supporting farming
10 July 2008	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 192/08	targeted benefit
10 July 2008	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 193/08	health insurance contribution
10 July 2008	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 194/08	health care services

Group B (Poland)			
Date	**Court**	**Case number**	**Subject**
22 April 2008	The Voivodeship Administrative Court in Białystok	II SA/Bk 822/07	family benefit
22 April 2008	The Voivodeship Administrative Court in Białystok	II SA/Bk 823/07	care allowance
14 August 2007	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 249/07	unemployment status
15 May 2007	The Voivodeship Administrative Court in Łódź	III SA/Łd 573/06	housing allowance
22 February 2007	The Voivodeship Administrative Court in Gliwice	IV SA/Gl 238/06	family benefit
16 February 2007	The Voivodeship Administrative Court in Warsaw	VI SA/Wa 2089/06	registering as a solicitor
31 January 2007	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 849/06	targeted benefit
31 January 2007	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 850/06	targeted benefit
16 May 2006	The Supreme Administrative Court	I OSK 8/06	periodic benefit
24 February 2005	The Voivodeship Administrative Court in Łódź	II SA/Łd 1315/03	housing allowance
19 June 1997	The Supreme Administrative Court	V SA 1512/96	permanent residence for a foreign national

Group C (Poland)			
Date	**Court**	**Case number**	**Subject**
28 October 2020	The Voivodeship Administrative Court in Rzeszów	II SA/Rz 818/20	traineeship scholarships
28 October 2017	The Voivodeship Administrative Court in Poznań	II SA/Po 948/17	traineeship scholarships
18 October 2017	The Voivodeship Administrative Court in Poznań	II SA/Po 540/17	unemployment status
18 October 2015	The Supreme Administrative Court	II GSK 2910/14	retirement benefits
14 December 2011	The Voivodeship Administrative Court in Szczecin	II SA/Sz 931/11	licensing of drivers
13 October 2011	The Supreme Administrative Court	II GPS 1/11	licensing for taxi drivers

Group C (Poland)			
Date	**Court**	**Case number**	**Subject**
27 July 2011	The Voivodeship Administrative Court in Białystok	II SA/Bk 309/11	care allowance
26 July 2011	The Voivodeship Administrative Court in Białystok	II SA/Bk 412/11	family benefit
15 May 2009	The Voivodeship Administrative Court in Warsaw	III SA/Wa 644/09	exemption from court fees
11 May 2009	The Voivodeship Administrative Court in Warsaw	III SO/Wa 6/09	exemption from a filing fee
20 November 2008	The Voivodeship Administrative Court in Warsaw	III SA/Wa 1879/04	exemption from court fees
11 April 2008	The Voivodeship Administrative Court in Warsaw	III SA/Wa 558/08	exemption from court fees
15 March 2006	The Voivodeship Administrative Court in Cracow	III SA/Kr 63/04	discharge from a prison service
4 January 2006	The Voivodeship Administrative Court in Wrocław	IV SA/Wr 175/04	a fine for not ensuring attendance at school
22 May 2000	The Supreme Administrative Court	II SA 2725/99	registering new legal trainees
23 March 1999	The Supreme Administrative Court	II SA 202/99	registering new legal trainees

Appendix 2.

Group A (Czechia)			
Date	**Court**	**Case number**	**Subject**
7 November 2024	The Municipal Court in Prague	19 Az 24/2024 - 66	international protection
10 January 2024	The Regional Court in Ústí nad Labem	75 Ad 2/2023 - 50	care allowance
27 January 2022	The Regional Court in Brno	30 Ad 13/2020 - 64	military service
14 January 2022	The Municipal Court in Prague	9 A 86/2020 - 138	compensation for damages
16 September 2021	The Supreme Administrative Court	6 Ao 27/2021 - 40	COVID-19 pandemic measures
22 July 2021	The Supreme Administrative Court	2 Ao 2/2021 - 44	COVID-19 pandemic measures
22 June 2021	The Supreme Administrative Court	2 Ao 3/2021 - 105	COVID-19 pandemic measures

Group A (Czechia)			
Date	**Court**	**Case number**	**Subject**
7 June 2021	The Supreme Administrative Court	1 Azs 41/2021 - 29	international protection
17 March 2020	The Municipal Court in Prague	10 Ad 4/2019 - 61	health insurance
13 January 2020	The Regional Court in Ústí nad Labem	42 Az 8/2018 - 61	international protection
12 December 2019	The Supreme Administrative Court	9 Ads 214/2018 - 63	health insurance
29 August 2019	The Municipal Court in Prague	10 Ad 5/2017 - 45	military service
8 February 2018	The Municipal Court in Prague	8 A 182/2016 - 80	birth registration
7 February 2018	The Supreme Administrative Court	5 Azs 295/2017 - 20	international protection
7 June 2017	The Regional Court in Brno	41 Ad 13/2016 - 88	social security
29 July 2015	The Regional Court in Brno	41 A 52/2014 - 33	housing allowance
29 May 2015	The Regional Court in Plzeň	30 A 31/2014 - 73	exclusion from the university
27 May 2015	The Supreme Administrative Court	3 Azs 264/2014 - 25	administrative expulsion
27 March 2015	The Regional Court in Brno	22 Az 1/2015 - 33	international protection
11 March 2015	The Regional Court in Brno	41 Az 11/2014 - 51	international protection
25 February 2015	The Regional Court in Brno	33 A 11/2014 - 60	housing allowance
17 April 2014	The Supreme Administrative Court	4 Ads 27/2014 - 28	health insurance
17 April 2014	The Supreme Administrative Court	4 Ads 113/2013 - 45	social security
24 April 2013	The Supreme Administrative Court	6 Ads 123/2012 - 76	extraordinary immediate assistance
31 January 2013	The Regional Court in Ústí nad Labem	78 Ad 29/2011 - 107	social benefits
31 January 2013	The Regional Court in Ústí nad Labem	78 Ad 30/2011 - 134	social benefits
11 November 2011	The Supreme Administrative Court	4 Ads 141/2011 - 83	social benefits
31 October 2011	The Supreme Administrative Court	4 Ads 79/2011 - 115	social benefits
31 October 2011	The Supreme Administrative Court	4 Ads 130/2011 - 119	social benefits
31 May 2011	The Regional Court in Ústí nad Labem	16 Cad 61/2008 - 52	social benefits

Group A (Czechia)			
Date	**Court**	**Case number**	**Subject**
24 March 2010	The Supreme Administrative Court	2 Ans 1/2010 - 32	housing
28 August 2009	The Supreme Administrative Court	7 As 29/2008 - 104	dissolving a civic association
29 April 2009	The Supreme Administrative Court	4 Ads 79/2008 - 61	noise limits
29 December 2008	The Supreme Administrative Court	4 Ads 128/2008 - 42	social security
31 October 2008	The Supreme Administrative Court	4 Ads 49/2008 - 73	noise limits
18 September 2008	The Supreme Administrative Court	4 Ads 106/2008 - 34	social security
31 March 2008	The Supreme Administrative Court	4 Ads 2/2008 - 66	social benefits
31 March 2008	The Supreme Administrative Court	4 Ads 3/2008 - 61	social benefits
31 March 2008	The Supreme Administrative Court	4 Ads 88/2007 - 62	social benefits
5 August 2003	The Supreme Administrative Court	4 Ads 35/2003 - 28	social security

Group B (Czechia)			
Date	**Court**	**Case number**	**Subject**
24 April 2024	The Supreme Administrative Court	7 Ads 67/2023 - 17	housing allowance
11 August 2023	The Supreme Administrative Court	2 As 241/2022 - 74	health services
30 May 2023	The Supreme Administrative Court	3 As 370/2020 - 33	housing
29 August 2022	The Regional Court in Brno	29 Ad 11/2020 - 63	military service
2 August 2022	The Regional Court in Brno	29 Ad 9/2020 - 68	military service
2 August 2022	The Regional Court in Brno	29 Ad 12/2020 - 66	military service
29 June 2022	The Regional Court in Brno	29 Ad 10/2020 - 74	military service
28 April 2022	The Regional Court in Brno	62 Ad 9/2020 - 69	military service
28 April 2022	The Regional Court in Brno	62 Ad 10/2020 - 69	military service
28 April 2022	The Regional Court in Brno	62 Ad 11/2020 - 64	military service
15 March 2022	The Municipal Court in Prague	19 Ad 19/2020 - 26	unemployment benefits
17 February 2022	The Regional Court in Brno	30 Ad 10/2020 - 42	military service
31 January 2022	The Regional Court in Brno	30 Ad 11/2020 - 44	military service
31 January 2022	The Regional Court in Brno	30 Ad 12/2020 - 44	military service
21 December 2021	The Supreme Administrative Court	4 As 171/2021 - 49	registering at school

Group B (Czechia)			
Date	**Court**	**Case number**	**Subject**
10 November 2021	The Supreme Administrative Court	2 Ao 10/2021 - 125	COVID-19 pandemic measures
26 October 2021	The Regional Court in Brno	31 Ad 9/2020 - 59	military service
26 October 2021	The Regional Court in Brno	31 Ad 10/2020 - 60	military service
26 October 2021	The Regional Court in Brno	31 Ad 11/2020 - 59	military service
27 September 2021	The Regional Court in Plzeň	60 Az 8/2021 - 60	subsidiary protection
23 June 2021	The Supreme Administrative Court	8 Ao 16/2021 - 124	COVID-19 pandemic measures
26 May 2021	The Municipal Court in Prague	15 A 75/2020 - 42	registering at school
9 April 2021	The Regional Court in Plzeň	60 Az 8/2021 - 25	subsidiary protection
15 February 2021	The Supreme Administrative Court	4 Azs 325/2020 - 29	international protection
30 November 2020	The Regional Court in Hradec Králové –the branch in Pardubice	50 Az 2/2020 - 82	international protection
11 November 2020	The Regional Court in Ústí nad Labem	15 A 118/2018 - 130	housing
26 October 2020	The Municipal Court in Prague	5 A 192/2017 - 76	registering at school
8 October 2020	The Regional Court in Brno	62 A 35/2020 - 186	protection of national minorities
30 June 2020	The Supreme Administrative Court	7 As 40/2019 - 32	housing
29 March 2019	The Supreme Administrative Court	5 Ads 89/2018 - 20	housing allowance
19 December 2018	The Regional Court in Ostrava – the branch in Olomouc	65 A 60/2018 - 69	housing
10 October 2018	The Regional Court in Brno	33 Az 2/2018 - 53	international protection
29 May 2018	The Regional Court in Ústí nad Labem	15 A 52/2018 - 59	temporary residence permit
28 June 2017	The Municipal Court in Prague	5 A 145/2015 - 49	social benefits
30 May 2017	The Regional Court in Hradec Králové	43 Az 26/2016 - 57	international protection
27 September 2016	The Supreme Administrative Court	1 Ads 92/2016 - 23	housing allowance
27 September 2016	The Supreme Administrative Court	1 Ads 94/2016 - 20	housing allowance
11 August 2016	The Supreme Administrative Court	5 Ads 181/2014 - 21	social benefits
24 June 2016	The Regional Court in Prague	47 A 2/2014 - 133	odour emissions

Group B (Czechia)			
Date	**Court**	**Case number**	**Subject**
27 April 2016	The Supreme Administrative Court	1 Azs 76/2016 - 27	international protection
8 April 2016	The Regional Court in Hradec Králové	32 Az 20/2015 - 43	international protection
7 March 2016	The Regional Court in Hradec Králové	29 Az 13/2015 - 44	international protection
4 March 2016	The Regional Court in Hradec Králové	32 Az 8/2015 - 43	international protection
24 February 2016	The Regional Court in Brno	31 A 53/2014 - 95	entrance exams for a university
10 February 2016	The Regional Court in České Budějovice	10 A 21/2015 - 50	administrative offence in the area of remuneration
27 January 2016	The Supreme Administrative Court	4 Ads 85/2015 - 57	social services
22 October 2015	The Regional Court in Prague	48 A 27/2015 - 98	odour emissions
19 September 2014	The Supreme Administrative Court	6 As 33/2013 - 50	school exams
20 June 2013	The Supreme Administrative Court	4 Azs 12/2013 - 38	international protection
21 February 2013	The Regional Court in Ostrava – the branch in Olomouc	73 Ad 23/2011 - 36	housing allowance
18 February 2013	The Municipal Court in Prague	11 A 131/2012 - 38	school exams
4 April 2012	The Supreme Administrative Court	3 Ads 72/2011 - 88	appointment to a position in Police service
8 July 2011	The Supreme Administrative Court	3 Ads 61/2011 - 36	housing allowance
9 February 2011	The Supreme Administrative Court	3 Ads 156/2010 - 53	housing allowance
22 December 2010	The Municipal Court in Prague	9 Ca 234/2009 - 39	appointment to a position of customs officer
24 November 2010	The Supreme Administrative Court	3 Ads 98/2010 - 56	housing allowance
18 November 2009	The Supreme Administrative Court	4 Azs 50/2009 - 75	international protection
18 December 2008	The Supreme Administrative Court	7 As 21/2008 - 101	long-term residence permit
31 May 2006	The Supreme Administrative Court	4 As 38/2004 - 116	school facilities

Group B (Czechia)			
Date	**Court**	**Case number**	**Subject**
15 December 2005	The Supreme Administrative Court	7 Azs 305/2004 - 61	asylum
20 July 2005	The Supreme Administrative Court	5 Azs 87/2005 - 43	asylum
19 January 2005	The Supreme Administrative Court	5 A 18/2002 - 54	military service
19 January 2005	The Supreme Administrative Court	7 A 142/2002 - 72	military service

Group C (Czechia)			
Date	**Court**	**Case number**	**Subject**
7 December 2022	The Supreme Administrative Court	10 As 320/2020 - 58	registering at school
15 June 2022	The Municipal Court in Prague	14 A 101/2021 - 248	climate protection
31 May 2022	The Regional Court in Brno	41 Az 20/2021 - 39	international protection
30 October 2020	The Regional Court in Ostrava – the branch in Olomouc	72 Ad 17/2019 - 24	care allowance
22 May 2020	The Supreme Administrative Court	3 As 90/2018 - 31	housing
13 May 2020	The Municipal Court in Prague	10 A 148/2018 - 65	registration of a primary school
29 April 2020	The Supreme Administrative Court	3 Ads 91/2018 - 32	housing
23 April 2020	The Supreme Administrative Court	5 Azs 189/2015 - 127	asylum
27 March 2020	The Supreme Administrative Court	5 Ads 131/2018 - 53	health insurance
31 January 2020	The Regional Court in Ostrava – the branch in Olomouc	72 Ad 44/2018 - 28	care allowance
9 May 2019	The Supreme Administrative Court	3 Ads 151/2016 - 117	social services
25 April 2019	The Supreme Administrative Court	8 Ads 271/2018 - 34	social services
20 August 2018	The Municipal Court in Prague	13 A 69/2018 - 24	administrative expulsion
25 June 2018	The Municipal Court in Prague	13 A 56/2018 - 27	administrative expulsion
21 June 2018	The Municipal Court in Prague	14 Ad 13/2017 - 50	health insurance
31 May 2018	The Municipal Court in Prague	13 A 35/2018 - 24	administrative expulsion

Group C (Czechia)			
Date	**Court**	**Case number**	**Subject**
19 March 2018	The Regional Court in Hradec Králové – the branch in Pardubice	52 Ad 12/2017 - 89	employment-related fines
11 January 2018	The Municipal Court in Prague	10 Ad 18/2014 - 86	permanent residence permit
10 October 2017	The Regional Court in Prague	46 Az 19/2016 - 29	international protection
13 June 2016	The Regional Court in Prague	46 A 91/2015 - 89	housing
13 May 2016	The Supreme Administrative Court	6 As 84/2016 - 12	legal aid (proceedings concerning housing supplement)
19 December 2014	The Regional Court in Hradec Králové – the branch in Pardubice	52 A 87/2014 - 71	permanent residence permit
19 December 2014	The Regional Court in Hradec Králové – the branch in Pardubice	52 A 103/2014 - 47	permanent residence permit
30 October 2014	The Supreme Administrative Court	4 Ads 134/2014 - 29	personal assistance services
28 February 2014	The Supreme Administrative Court	5 Afs 72/2012 - 95	tax law (real estate)
29 August 2013	The Supreme Administrative Court	4 Ads 31/2013 - 18	pension benefits
22 March 2013	The Supreme Administrative Court	5 Afs 71/2012 - 37	tax law (real estate)
13 March 2013	The Supreme Administrative Court	5 Afs 73/2012 - 41	tax law (real estate)
25 August 2011	The Supreme Administrative Court	3 Ads 130/2008 - 204	pension benefits
21 July 2009	The Supreme Administrative Court	6 Ads 88/2006 - 132	social security
16 April 2008	The Supreme Administrative Court	1 Afs 62/2008 - 93	tax law (real estate)
28 December 2007	The Supreme Administrative Court	8 Afs 141/2006 - 77	tax law (real estate)
13 December 2007	The Supreme Administrative Court	8 Afs 9/2007 - 128	tax law (real estate)
13 December 2007	The Supreme Administrative Court	8 Afs 10/2007 - 126	tax law (real estate)
13 December 2007	The Supreme Administrative Court	8 Afs 11/2007 - 128	tax law (real estate)
13 December 2007	The Supreme Administrative Court	8 Afs 139/2006 - 68	tax law (real estate)

Group C (Czechia)			
Date	**Court**	**Case number**	**Subject**
9 November 2007	The Supreme Administrative Court	5 Afs 182/2006 - 139	tax law (real estate)
8 November 2007	The Supreme Administrative Court	7 Afs 190/2006 - 73	tax law (real estate)
26 October 2007	The Supreme Administrative Court	8 Afs 140/2006 - 77	tax law (real estate)
19 September 2007	The Supreme Administrative Court	1 Afs 128/2006 - 74	tax law (real estate)
19 September 2007	The Supreme Administrative Court	1 Afs 143/2006 - 68	tax law (real estate)
28 August 2007	The Supreme Administrative Court	2 Afs 212/2006 - 147	tax law (real estate)
31 July 2006	The Supreme Administrative Court	A 2/2003 - 73	access to information
27 January 2006	The Supreme Administrative Court	4 Ads 23/2005 - 50	social security
25 January 2006	The Supreme Administrative Court	4 Ads 5/2005 - 45	social security
26 October 2005	The Supreme Administrative Court	3 Ads 2/2003 - 112	social security
23 February 2005	The Supreme Administrative Court	6 Ads 62/2003 - 31	social security

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RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN EGYPT, SAUDI ARABIA AND IRAQ: COULD THERE BE A REGION-SPECIFIC APPROACH TO INTERNATIONAL ARBITRATION?[**]

Abstract: *Arbitration award enforcement proceedings are the crucial point of any dispute, as even the most groundbreaking award is pointless if it cannot be executed. The issue of the enforceability of awards is especially interesting in the region usually omitted from discussions on alternative dispute resolution: West Asia and North Africa. Usually portrayed as a monolith, the Arab states counter this assumption by taking on a highly nuanced and jurisdiction-specific approach to international arbitration. This paper presents snippets of recognition and enforcement legislation and the case law from three states: Egypt, characterised by its active engagement in international arbitration; the Kingdom of Saudi Arabia, traditionally vested in the legal tradition of Islamic law; and Iraq, which only recently acceded to the international award implementation system. These examples are employed to determine whether there are any region-specific similarities in domestic courts' reasoning on international arbitration. The legislation and cases analysed herein provide a unique outlook on these underrepresented jurisdictions, characterised by firm attachment to national law and legal tradition and subjected to global currents of economic liberalisation.*

Keywords: international arbitration, enforcement of arbitral awards, Egypt, Saudi Arabia, Iraq, regional approaches to international arbitration

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INTRODUCTION

The enforcement of an arbitral award is a crucial element of dispute resolution. Thus, the almost automatic mechanism ensured by the system of international conventions is considered an important advantage of international arbitration. At the same time, limited domestic review falls within the enforcement regime and is necessary for ensuring both compliance with provisions of domestic law and the arbitral award itself. Thus, domestic judges are expected to scrutinise such an award to ensure that the basic requirements of enforcement are met.[1]

In an era of globalised trade and investment, domestic judicial systems increasingly encounter foreign judicial decisions, raising the question of how these should be implemented within national jurisdictions. When domestic courts act as "enforcement agencies" for tribunals,[2] it is possible to observe interactions between domestic adjudicators and arbitrators: the former analyse the awards of the latter and determine how they should be implemented.

This paper analyses specific aspects of this judicial engagement in three national jurisdictions: Egypt, Saudi Arabia and Iraq. All of them are bound together by the official language of proceedings (Arabic), a common cultural background and at least partially non-Western legal heritage, strongly rooted in Islamic law. The "Middle East", and in particular the "Arab Middle East" has been recognised as one coherent region[3] – a group of states bound together by a common identity, language, geographic location, history, ideologies (such as pan-Arabism and pan-Islamism) and even certain integration initiatives, both political and economic.[4] However, each of these states has formed its own judicial system, based on legislation designed to fit its specific interests in accordance with its legal tradition – hence the unique system of each country. Considering both the presumed regional unity and the inherent national distinctiveness, the question arises as to how similarly domestic courts interact with arbitration tribunals in the Middle East. Are these similarities substantial enough to define a region-specific approach?

The three states under analysis were selected according to the most distinctive features of their foreign award enforcement case law. Egypt was chosen because of

[1] C.H. Schreuer, *The Implementation of International Judicial Decisions by Domestic Courts*, 24 International and Comparative Law Quarterly 153 (1975), p. 154.

[2] A. Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loyola of Los Angeles International and Comparative Law Review 133 (2011), p. 145.

[3] Silvia Ferabolli discusses various means of delimiting that region, ultimately concluding that it is the League of Arab States which plays the main role in defining the term "Arab" and constructing an Arab identity within the 22 member states (S. Ferabolli, *Arab Regionalism: A Post-Structural Perspective*, Routledge, New York: 2014, pp. 76–77).

[4] Such as the League of Arab States, the Gulf Cooperation Council or the Arab Maghreb Union.

its longstanding active engagement in international arbitration based on the New York Convention.[5] Its judiciary attempted numerous times to balance investors' interests and the state's right to regulate. Thus, the Egyptian enforcement case law is focussed predominantly on a national understanding of the public policy exception. Apart from its well-developed jurisprudence, Egypt also houses one of the most recognisable arbitration centres in the region – the Cairo Regional Centre for International Commercial Arbitration – which further strengthens its proactive attitude towards alternative dispute resolution.

The second section outlines the changes that enforcement has undergone in the Kingdom of Saudi Arabia in recent years. This jurisdiction is of special interest due to its strong attachment to the legal tradition based on Islamic law (Sharia). The incorporation of Sharia in the legal system compels enforcement judges to adopt a particular approach to judgments of arbitrators from international tribunals, also invoking the public policy exception to safeguard local principles of law. Saudi Arabia's law has not only been fully based on Islamic law, with limited and delayed codification, but it has also since been subject to rather little influence of external, especially Western (both continental and common) legal tradition, as it has never been colonised.

Finally, the last section of this article is devoted to award enforcement in a jurisdiction which only recently was opened up to foreign arbitral awards. It discusses the recent accession of Iraq to the international award implementation system and examines the possible outcomes of this development, as well as the anticipated changes to the recognition and enforcement of international arbitral awards. In this case, the approach to international arbitration is predominantly assessed through domestic law, with scarce involvement of international norms.

The enforcement of awards issued in domestic arbitration is always subject to local laws, unsurprisingly – these are the reference points for domestic courts. On the other hand, when faced with an award issued by an international arbitration tribunal, domestic courts should also take into consideration the system of international arbitration[6] (in both commercial and investment disputes), consisting firstly of international agreements between states, and secondly of any particular contracts on which the dispute at hand are directly based. The global system of recognition and enforcement of foreign arbitral awards is structured in the form of the New York Convention, the key instrument in international arbitration. It guarantees

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted on 10 June 1958, entered into force on 7 June 1959), 330 UNTS 33.

[6] The term "system" has been used to reinforce the fact that the regulations of international arbitration create a full "body of norms sufficiently organized, complete, and effective to qualify as a system" (E. Gaillard, *The Emerging System of International Arbitration: Defining "System"*, 106 Proceedings of the Annual Meeting 287 (2012).

the enforcement of foreign arbitral awards and binds contracting states to observe the awards of international tribunals; it is one of the most successful international agreements,[7] enjoying the widest acceptance among the international community, with over 150 parties, including countries from West Asia and North Africa. Almost all Arab states are parties to this agreement, with the exception of Libya and Yemen, and the most recent accession was that of Iraq in 2021. The enforcement rules it envisages extend to two kinds of arbitral awards: foreign awards, i.e. awards rendered in a state other than the one in which enforcement is sought, and non-domestic, that is, judgments that for some reason cannot be considered domestic by national enforcement courts.[8] The second type of awards may be found in three instances: when an award is made in the state of enforcement, but under foreign substantial law, or foreign procedural law or under no specific domestic law (an "a-national" award).[9]

Nonetheless, there are also region-specific implementation frameworks: in West Asia and North Africa there is the Riyadh Arab Agreement for Judicial Cooperation (the Riyadh Convention),[10] which was signed in 1983 and provides more detailed provisions on the exchange of judicial and administrative information, in both civil and penal matters. This is one of the most crucial instruments of Arab League cooperation.[11] In Arab judicial practice, foreign arbitral awards are enforced in compliance with the New York Convention, the Riyadh Convention (if applicable) and domestic law.

1. PUBLIC POLICY EXCEPTION AS A BAROMETER OF ARBITRATION CLIMATE IN EGYPT

The public policy exception from Art. V(2)(b) of the New York Convention is one of the grounds for refusing to recognise an arbitral award. This has been drafted as a safety valve for states; however, its scope and extent remain unclear, for both arbitration tribunals and domestic courts[12] – hence its recurring nickname, the "unruly

[7] *See* G. Born, *The New York Convention: A Self-Executing Treaty*, 40 Michigan Journal of International Law 115 (2018), p. 184; M. Fahim Nia, *Enforcement of Foreign Arbitral Awards: A Closer Look at the New York Convention*, Nova Science Publishers, Hauppauge, New York: 2017, p. 135.

[8] Fahim Nia, *supra* note 7, p. 34.

[9] *Ibidem*, p. 44.

[10] Council of Arab Ministers of Justice, *Riyadh Arab Agreement for Judicial Cooperation*, 6 April 1983, available at: https://www.refworld.org/legal/agreements/las/1983/en/39231 (accessed 10 September 2025).

[11] M.I. Aleisa, *A Critical Analysis of the Legal Problems Associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?*, University of Essex, Essex: 2016, p. 154.

[12] B. Pirker, *Proportionality Analysis and International Commercial Arbitration – The Example of Public Policy and Domestic Courts*, in: H. Palmer Olsen, J. Jemielniak, L. Nielsen (eds.), *Establishing Judicial Authority in International Economic Law*, Cambridge University Press, Cambridge: 2016, p. 303.

horse".[13] A teleological interpretation of that reservation (following the New York Convention's main aim: to ensure enforceability of arbitral awards) should lead to the conclusion that it is supposed to be construed rather narrowly and restrictively.[14] The theory of public policy is constantly developing, particularly when it comes to either positioning that principle in the sphere of international law – thus shaping it into supranational public policy, focussed more on the universal notions of morality and justice[15] – or emphasising the meaning of states' sovereignty and interests.[16] Practice so far has shown that both of these theories might find support in the domestic courts of various jurisdictions.[17]

The concept of public policy is also included in Egyptian law no. 27/1994 (Egyptian Arbitration Law [EAL]).[18] Art. 53(2) stipulates that "[t]he court adjudicating the action for annulment shall *ipso jure* annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt." Translated into Arabic as "*al-niẓām al-ʿāmm*" (literally "public order"), this phrase has been inconsistently interpreted on a case-to-case basis. The EAL generally provides grounds for setting aside the award similar to Art. 34 of the UNCITRAL Model Law,[19] but also cites other grounds: if a tribunal fails to apply the substantive law chosen by the parties and or violates an essential procedural rule of Egyptian domestic legislation.[20] That being said, the enforcement judgments do contain at least a brief reference to the New York Convention.[21] Local jurisprudential practice has confirmed that the New York Convention forms part of the Egyptian legal order and domestic laws shall not be applied if they are more onerous to the parties, as per the judgment of

[13] Judgment of the Court of Common Pleas of 24 November 1824, *Richardson v. Mellish*, 2 BING. 229, para. 252. The phrase originated from a decision of the English Court of Common Pleas: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."

[14] Pirker, *supra* note 12, p. 305.

[15] J.D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8(1) Chinese Journal of International Law 81 (2009), pp. 87–89.

[16] L. Trakman, *Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection*, 6 The Chinese Journal of Comparative Law 174 (2018), pp. 178–179.

[17] L. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 Tulane Law Review 207 (2018), pp. 230–231.

[18] Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters [1994] OG 16 (bis) 27.

[19] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

[20] Y.I. Badr, *Resolving Arab Capital Investment Disputes: The Aftermath of the Al-Kharafi Award's Annulment by the Egyptian Courts*, 1 Journal of Law in the Middle East 52 (2021), p. 69.

[21] *See e.g. The C.E.O of El-Husan Company for Import, Export and food packaging & wrapping S.A.E. v. El-Khaleej for Sugar Co., and the Minister of Justice* [Cairo Court of Appeal], judgment of 21 July 2011, Case 86/125; *Harbottle Company Limited v. Egypt for Foreign Trade Company* [Cairo Court of Appeal], judgment of 21 May 1990, Case 815/52; *Interfood Co. v. The legal representative of RCMA Asia Pte Ltd Singapore* [Egyptian Court of Cassation], judgment of 9 January 2020, Case 282/89.

the Court of Cassation in the dispute between John Brown Deutsche Engineering and SEMADCO.[22] Egyptian jurisdiction is generally considered to have adopted a pro-enforcement approach.[23]

1.1. Shaping the public policy exception through domestic law

One of the first enforcement cases in which the Egyptian court considered the public policy exception was in *Harbottle Company Limited v. Egypt for Foreign Trade Company*.[24] The dispute revolved around a breach of contract for coal that Harbottle was supplying. In arbitration proceedings in London, the defendant was awarded compensation with interest, which they then sought before the South Cairo Court of First Instance. That court refused enforcement and dismissed the case, and the Cairo Court of Appeal upheld the challenged judgment. Ultimately, the case was submitted to the Court of Cassation, which ruled partially in favour of the defendant, allowing enforcement of damages and interest up to 5%. The court justified the rejection of the latter part of the award (as the interest was initially set to 8%) due to the public policy exception, since domestic commercial law at that time permitted no more than 5% interest on damages. Thus, the court reasoned that any award rendered in contradiction with national legislation violated domestic public policy and any part which is incompatible with municipal law should not be enforced. However, it also emphasised that the court should enforce the remaining part, as long as it is in line with domestic regulations.

Apart from the clear focus on domestic public policy considerations – i.e. the understanding of justice defined by national legislation instead of international treaties – the substantive matter for the basis of refusal is also notable. Reluctance to accept high interest (a notion that would reappear in Egyptian courts) might not only stem from a literal reading of the word of (domestic) law, but may also be rooted deeper in the local legal tradition. Although Egypt's legislation and jurisprudence follow the civil-law system, Islamic law has been awarded primary significance. In the Constitution of 1971 Sharia was designated as the principal source of legislation,[25] and that declaration was stated in both the 2011 interim constitution[26] and the 2012

[22] *John Brown Deutsche Engineering v. El Nasr Company for Fertilizers & Chemical Industries (SEMADCO)* [Cairo Court of Appeal], judgment of 6 August 2003, Case 32/119. John Brown sought enforcement of an award against SEMADCO before the Egyptian courts, but once the ruling was implemented SEMADCO challenged the recognition on the grounds that it violated Egyptian public policy, as per Art. V.2(b) of the New York Convention.

[23] M.I. Bhatti, *Islamic Law and International Commercial Arbitration*, Routledge, London: 2018, pp. 216–217.

[24] *Harbottle Company Limited v. Egypt for Foreign Trade Company* [Cairo Court of Appeal], judgment of 21 May 1990, Case 815/52.

[25] Constitution of the Arab Republic of Egypt [1971, as amended in 2007], Art. 2.

[26] Constitutional Declaration [2011], Art. 2.

constitution;[27] it is also now included in the 2014 constitution.[28] Although those religious foundations are visible predominantly in the sphere of family relations, they can also be noted in commercial dealings. As such, it could be argued that the consistent (as will be argued in later paragraphs) aversion towards excessive interest derives directly from Sharia's prohibition of *ribā*, usurious interest, which is considered to be exploitative and unjustified enrichment.[29] The extent of this prohibition may vary, and although it indisputably covers bank loans, it might also be extended to any debt, including the obligation to pay compensation awarded by an arbitral tribunal. The approach to *ribā* differs between jurisdictions, depending on the level of rigidity and influence of Islamic law, with the Egyptian approach being shaped rather by discouragement than prohibition per se (apart from compound interest, which is strictly forbidden).[30]

In the more recent case of *Abu-Ghenema Co. v. SHINNG Co. S.A.*,[31] the Cairo Court of Appeal reiterated the public policy exception as contained in the New York Convention in conjunction with the EAL. It considered that refusing to recognise an award on the grounds of breaching public policy requires that the award contradicts Egyptian law and that this contradiction must relate to the public policy of the state. The court understood this principle as rules established to "attain public interest for the State in the political, social or economic dimension, which relates to the natural, material or moral order of the society, prevailing over the interests of individuals."[32] Public policy therefore is not determined by objective standards, but is rather left to the discretion of the judge, restricted only by the general notions of importance at the time of adjudication. It is a strong reiteration of the "domestic" public policy concept (as opposed to the supranational public policy mentioned in previous paragraphs). In this ruling, the court also refused enforcement of part of the award, as the awarded interest exceeded the statutory limit.

This view was later endorsed by the Court of Cassation in *Interfood Co. v. RCMA Asia Pte Ltd Singapore*,[33] in which the court additionally pronounced that a court reviewing an enforcement case may not reconsider the merits, but must either recognise or refuse the award.

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[27] Constitution of the Arab Republic of Egypt [2012], Art. 2.

[28] *Ibidem*.

[29] The Qur'an (2:275, 3:130).

[30] Bhatti, *supra* note 23, pp. 174–76.

[31] *Abu-Ghenema Co. v. SHINNG Co. S.A.* [Cairo Court of Appeal], judgment of 28 January 2018, Case 5/124.

[32] *Ibidem*, p. 7.

[33] *Interfood Co. v. The legal representative of RCMA Asia Pte Ltd Singapore* [Egyptian Court of Cassation], judgment of 9 January 2020, Case 282/89.

Refusal to enforce an award which partially exceeds the statutory interest has been acknowledged among arbitration scholars and practitioners.[34] The judgments of Egyptian courts are not incoherent in their treatment of interest above the permissible norm and, as such, should be generally considered justifiable and in line with the domestic understanding of equitable debt repayment. However, when taking into consideration the current (January 2025) state of the Egyptian economy,[35] it should be noted that further re-evaluation of this judicial practice – and the allowed interest rate in general – might be needed, as it no longer serves as a sufficient tool to ensure that the value of compensation eventually repaid corresponds to the initial estimate made by the arbitration tribunal.

There are some very recent judgments on the implementation of arbitral awards that shed more light on the public policy exception as construed within the Egyptian legal regime, including the international arbitration case of *Al-Kharafi v. Libya*.[36] The saga of the Al-Kharafi award enforcement began in 2013, when an arbitral award was issued under the Unified Arab Investment Agreement[37] by a tribunal formed under the rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in Cairo, Egypt. With interest, it was worth approximately USD 1 billion. The subsequent proceedings were initiated in both Egypt and France, lasting in the latter jurisdiction until February 2023.[38]

The judgment of significance to the notion of public policy was made in a dispute between Mohamed Abdulmohsen Al-Kharafi & Sons Company – a Kuwaiti construction company – and the State of Libya over a failed project for hospitality

[34] S.H. Reisberg, K.M. Pauley, *An Arbitrator's Authority to Award Interest on an Award until "Date of Payment": Problems and Limitations International*, 1 Arbitration Law Review 25 (2023), p. 27.

[35] For the past few years, Egypt has been struggling with high inflation; it reached its 10-year peak in September 2023 (38%), and only in 2025 started to slow down, with the most recent data showing 12% in August 2025. *Egypt Inflation Rate*, Trading Economics, available at: https://tradingeconomics.com/egypt/inflation-cpi (accessed 10 September 2025).

[36] It is disputable whether the Al-Kharafi arbitral award falls within the scope of the New York Convention; if so, it should be considered an "a-national" award, rendered under no specific national law, but rather in line with the substantial provisions of the Unified Arab Investment Agreement and procedural requirements of the Cairo Regional Center for International Commercial Arbitration (CRCICA) in Cairo. The content of the New York Convention remains outside the scope of this article; that being said, it is beyond any doubt that the Egyptian Arbitration Law does apply to enforcement sought in Egypt, and thus judicial interpretation of the public policy provision in this dispute constitutes a significant contribution to this doctrine in Egypt's jurisdiction.

For further reading on the Al-Kharafi jurisdiction conundrum, *see e.g.* M. Mahmoud, *Egyptian Arbitration Law: The Absence of Some Generic Concepts of the New York Convention of 1958 (A Private International Law Perspective)*, 3 International Journal of Doctrine, Judiciary and Legislation 442 (2022).

[37] Unified Agreement for the Investment of Arab Capital in the Arab States (signed on 26 November 1980, entered into force on 7 September 1981), not published in the UNTS.

[38] The enforcement case considered by the French courts did not satisfy Al-Kharafi's claims, as the assets it sought to seize were frozen under international regulations. The last judgment in that regard was issued on 23 November 2023, by the Paris Court of Appeal (no. 22/05055).

infrastructure in Libya, which was hindered by the public authorities demanding the return of land and later revoking the applicant's licence for refusing the state's demands. Faced with a loss at arbitration, the host state hoped the decision would be set aside by the Cairo Court of Appeal under the EAL. After lengthy proceedings in the appellate court and the Court of Cassation, the Cairo Court of Appeal ultimately set the award aside on public policy grounds. It concluded that the arbitration panel had overestimated damages due to the addition of the potential loss of profits that the court considered "dreams, visions and aspirations", whilst only direct future damages should be included, thus leading to the disproportionality of the adjudicated sum. It reasoned that the proportionality of damages is tied to the established principle of public policy, as this relates strongly to the rights of individuals and their legitimate expectations. As such, the court concluded that national judicial institutions are entitled to set aside an award that orders an aggravating and utterly unjust remedy, thus linking the estimation of damages to the public value of legitimate expectations.[39]

By this decision, the appellate court undertook to consider anew the factual and legal background of the case, somehow positioning itself in lieu of the actual tribunal. However, it should be noted that in this case, the arbitral tribunal did indeed take it upon itself to calculate *lucrum cessans* based on predictions that had no chance of being realised: the project was to be built in a country on the brink of civil war, so the hospitality facility never would have been operational. Thus, perhaps it was overly optimistic to estimate the potential losses of Al-Kharafi and Sons at hundreds of thousands of dollars, as the Court of Appeal pointed out.[40]

The investor objected to the award being set aside and challenged the judgment before the Court of Cassation, which overturned the ruling of the Court of Appeal. The court evaluated the matter only from the perspective of national legislation. It stressed that the EAL does not provide the overestimation of damages as grounds for annulling an award, thus rejecting the Court of Appeal's reasoning that linked the value of compensation to public policy. The Court of Cassation focussed predominantly on the fact that domestic courts cannot review arbitral awards on their merits. By refraining from addressing the connection between the overestimation of damages and public policy – treating it solely as a review of merits – it signalled a narrow interpretation of this exception and left no room to extend its application to the specific circumstances of the award in question. This decision, due to

[39] *See also* Pirker, *supra* note 12, p. 310. According to Pirker, domestic courts usually apply one of two approaches when refusing enforcement on the grounds of public policy: either they examine whether the award in question violated a certain value protected by public policy, or they reflect upon the gravity of a violation of a specific norm to establish whether it was serious enough to be set aside.

[40] Badr, *supra* note 20, p. 79.

its very concise shape, answers the question of interplay between the principle of proportionality and public policy very rigidly. The court left no doubt as to the fact that proportionality and public policy are two distinct concepts that do not derive from one another.

The Al-Kharafi final judgment was welcomed by investors arbitrating or seeking enforcement in Egypt, as it greatly narrows the scope of interpretation of the public policy exception.[41] Nonetheless, the outcome of this case may seem to be somehow in conflict with the previous pronouncements of Egyptian courts. Especially regarding the estimation of financial compensation due, they now seem to be rather lenient towards the nominal amount of damages, although there is no indication that interest rates above the statutory limit will become seen as acceptable for enforcement. From an investor's perspective, this discrepancy may appear unjustified: depending on the specifics of an arbitral ruling, they may or may not be entitled to receive the full financial compensation awarded. However, from the perspective of the Egyptian State, the distinction becomes more understandable. The reluctance to permit higher interest rates reflects an effort to maintain equitable treatment for both domestic debtors – who are bound by statutory limits – and international ones, further reinforced by Islamic law's traditionally apprehensive attitude towards interest rates.

1.2. Shifting (certain) tides in award enforcement

Notwithstanding the appraisal presented above, shortly after the *Al-Kharafi* judgment the Egyptian Court of Cassation took a much more interventionist approach to the public policy exception. The case in question was initiated by Damietta International Port Company SAE (DIPCO) against the Damietta Port Authority (DPA), the public agency in charge of Damietta port administration.[42] The dispute revolved around the DPA's unilateral annulment of a concession agreement in 2015. The case was submitted to the CRCICA under ICC Rules. The tribunal considered the termination of the concession agreement unlawful and ordered the DPA to pay almost USD 500 million in compensation to DIPCO. The DPA sought an annulment of the arbitral award, which was initially not granted by the Cairo Court of Appeal; the case was then brought before the Court of Cassation. The court reasoned that the licence agreement is related to the activity of a public service

[41] I. Shehata, A. Rasekh, K. Duggal, *All's Well That Ends Well? Looking at the Future of the Unified Arab Agreement in Light of the Al-Kharafi v Libya Decisions by the Egyptian Courts*, 37(3) ICSID Review – Foreign Investment Law Journal 654 (2022), p. 671.

[42] Although the arbitration was conducted under the ICC Rules, it should be noted that the enforcement was correctly conducted solely under the EAL, as the "arbitration rules" dictating the shape of arbitral proceedings are not synonymous with the "applicable procedural law" and cannot justify applying the New York Convention – *see* Mahmoud, *supra* note 36.

(a terminal in a port), for which the administration (DPA) had adopted the method of public law in granting a licence to establish and operate a container terminal on state-owned land; therefore, it is considered a contract of public works and public utility. As such, it is an administrative contract in nature and confers to the administrative authority powers relating to public policy. Due to the administrative nature of that contract, only state courts could adjudicate on the validity of the annulment, and, by deciding the case in their stead, the tribunal had violated Egyptian public policy, as the contract could not be subject to the tribunal's jurisdiction. Therefore, pursuant to Art. 53(2) of the Egyptian Arbitration Law, the award was set aside.

The EAL, quite contrary to the Court's pronouncement, does allow for arbitration between public and private entities – in its very first article.[43] The only additional requirement for administrative contracts is an *a priori* approval of the arbitration agreement granted by the public authority competent to conclude a contract in question. There is no clear trend in the Arab region to regulate administrative contracts. In certain jurisdictions, such as Kuwait,[44] a debate on the nature and arbitrability of administrative contracts has been ongoing for some time now, while others – for example, Saudi Arabia – allow this conditionally.[45] While this suggests that there is no preferred type of regulations from the states' perspective, it should be noted that the universal arbitrability of administrative contracts would be beneficial for potential investors.

Notwithstanding the EAL, by considering the annulment, the Egyptian judiciary clearly drew a line separating contracts of private and administrative natures (as a side note, saving the state from paying billions of Egyptian pounds in damages[46]) and insisted that they are not arbitrable disputes. Contrary to the *Al-Kharafi* judgment, this decision did not spark enthusiasm among investors, as its expansion

[43] *See* Art. 1 EAL (translated by the author): "Without prejudice to the provisions of international agreements in force in the Arab Republic of Egypt, the provisions of this law [the EAL] apply to every arbitration between public-law or private-law persons, regardless of the nature of the legal relationship around which the dispute revolves, if this arbitration is conducted in Egypt or is an international commercial arbitration conducted abroad and its parties agreed to subject it to the provisions of this law.

Regarding administrative contract disputes, the agreement to arbitrate shall be made with the approval of the competent minister or whomever assumes his jurisdiction with respect to public legal persons, and it is not permissible to delegate this."

[44] K. Alhamidah, *Administrative Contracts and Arbitration, in Light of the Kuwaiti Law of Judicial Arbitration No. 11 of 1995*, 21 Arab Law Quarterly 35 (2007).

[45] H.S. Alhussein, Z. Meskic, A. Al-Rushoud, *Sustainability and Challenges of Arbitration in Administrative Contracts: The Concept and Approach in Saudi and Comparative Law*, 8 Special Issue: International Conference on Legal, Socio-economic Issues and Sustainability 1 (2023), p. 14.

[46] *See e.g.* a press release from the DPA's counsel: *A Historic Ruling That Saves the Egyptian Government an Estimated EGP 8 Billion in Settlements*, Sarie El-Din and Partners, 11 July 2021, available at: http://www.sarieldin.com/news/press-release/sarie-eldin-partners-historic-ruling-saves-egyptian-government-estimated-egp-8 (accessed 30 June 2025).

of the public policy exception onto a whole category of contracts has significantly limited the impact that international arbitration may have on settling disputes with Egyptian public entities.[47]

In the rich history of enforcement decisions rendered by the Egyptian judiciary to date, the public policy exception has been interpreted rather narrowly. This jurisprudential direction has fostered an environment that is favourable to both commercial and investment arbitration, seated both outside Egypt and within its territory. As the courts were not eager to annul awards on the vague and undefined grounds of public policy, those interested in conducting business linked to the Egyptian State anticipated fair and effective dispute resolution, which presumably increased their willingness to participate in the Egyptian economy. The case law remained cohesive and allowed parties to effectively plan litigation strategy and predict the outcome of enforcement proceedings. The courts seemed to adhere to the principles of alternative dispute resolution, including their determination to uphold the award, even if in a slightly modified shape. Therefore, among identifiable patterns in recognition and enforcement of arbitral awards, there is a strong inclination towards ensuring the implementation of the award, even if part of it must be overturned due to noncompliance with domestic law. However, recent developments signal that the courts are also taking up an active role in protecting Egyptian public assets and the interests of state-owned entities. The judges in *DIPCO* rejected the entirety of an award rendered after lengthy arbitration proceedings in order to protect public funds by denying arbitrability to a whole group of contracts: administrative ones. This decision suggests that the Egyptian judiciary may become rather interventionist when certain public values are at stake. It might also become the basis for further interventionist decisions, potentially making any disputes between private entities and Egyptian public companies or authorities non-arbitrable under the cover of "administrative contracts". In such case, the mutual understanding of a shared objective would be called into question, as the roles of the judiciary and arbitrators would diverge significantly, with the former leaning more towards safeguarding the state and the latter traditionally favouring the private party.

[47] D. Baizeau, A. Barrier, B. Rigaudeau, *Assessment Report on Arbitration Centre in Egypt (CRCICA)*, African Development Bank, Abidjan: 2022, p. 34, available at: https://www.afdb.org/sites/default/files/2023/01/24/2022_report_on_arbitration_centre_crcica_published.pdf (accessed 30 June 2025).

2. THE INFLUENCE OF ISLAMIC HERITAGE ON AWARD ENFORCEMENT IN SAUDI ARABIA

The Kingdom of Saudi Arabia, the birthplace of Islam, takes pride in its long-standing tradition of arbitration, dating back to early Islamic, or even pre-Islamic times. Sharia strongly promotes this alternative method of settling disputes, as even the Qur'an mentions it,[48] and its traces are also visible in the Riyadh Convention, which lists contradictions to Islamic law as grounds for refusing to recognise a judgment.[49]

To this day, Islamic law has influenced the legal system of the Gulf Cooperation Council countries, including Saudi Arabia, which is evident in an explicit reference to Sharia in the Kingdom's Basic Law on Governance.[50] Although the Kingdom is a Contracting Party to the New York Convention, ratified in 1994, the Saudi Arabian courts seem reluctant to reference that treaty in their judgments and or adhere to arbitration principles, as with several of their GCC counterparts.[51] This might be seen in a negative light by potential investors interested in conducting business and arbitrating commercial disputes in this state, since it comes across as incohesive in its application of international obligations, creating an atmosphere of uncertainty for business arbitration. The Saudi Arbitration Law (SAL)[52] is predominantly based on the UNICTIRAL Model Law, though it also contains reference to Sharia in Arts. 25 and 55(2)(B). That reference, when combined with the public policy exception – also understood to be closely tied with Islamic principles[53] – means that a lack of compliance with specific religious requirements might result in refusal of enforcement in this jurisdiction.[54]

Alongside the most important Islamic rules relating to commerce and business activity, there are the strict approach to observing private contracts[55] and the

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[48] M.T.-D. Al-Hilālī, M.M. Khān, *Interpretation of the Meanings of the Noble Qur'ān in the English Language*, Darussalam, Riyadh: 1995, p. 172. Qur'an 4:35. For more Islam-based context, *see also* S. Al-Ammari, A.T. Martin, *Arbitration in the Kingdom of Saudi Arabia*, 30 Arbitration International 387 (2014), p. 388.

[49] Arts. 30(a) and 37(e).

[50] Equivalent to the constitution – Basic Law on Governance [1412 AH, 1992 AD], Art. 8.

[51] R.M. Seyadi, *Understanding the Jurisprudence of the Arab Gulf States National Courts on the Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 12 International Review of Law 1 (2017), p. 11.

[52] Royal Decree no. M/34 concerning the approval of the Law of Arbitration [1433 AH, 2012 AD], Art. 2.

[53] Al-Ammari, Martin, *supra* note 48, p. 390.

[54] A.Q. Farah, R.M. Hattab, *The Application of Sharī'ah Finance Rules in International Commercial Arbitration*, 16 Utrecht Law Review 117 (2020), p. 137.

[55] J.A. Mohammed, *Business Precepts of Islam: The Lawful and Unlawful Business Transactions According to Shariah*, in: C. Luetge (ed.), *Handbook of the Philosophical Foundations of Business Ethics*, Springer, Dordrecht: 2013, p. 889.

prohibition of abusive interest (a described in section 2).[56] Unclear or speculative wording of the rights and obligations stemming from an agreement (*ǧirār*) are also forbidden, since they are perceived as being linked to gambling, which is also condemned in Sharia.[57] It has also been documented that Saudi Arabian courts tend to adopt a restrictive approach to potential damages (*lucrum cessans*) and awarding additional compensation thereto, as these are seen as speculative and unearned.[58] Thus, the main features responsible for the distinction between Islamic arbitration and secular arbitration are related to substantial matters. Procedural provisions of due process are rather similarly interpreted in both Sharia and international law.[59] As such, they do not threaten the enforcement capability of an award.

2.1. Where religion and arbitration meet

The first codified attempt at regulating arbitral award enforcement in Saudi Arabia took place in the 1980s, with the introduction of the first arbitration regulations[60] ("old Arbitration Law", which was not replaced until 30 years later, in 2012). The main characteristics of the old regime included the possibility of reviewing the merits of the award to ensure its compliance with national legislation, including the religion-inspired provisions. Under the old Arbitration Law, the Board of Grievances[61] – an organ responsible for recognising awards – would use its competence to ensure conformity with Sharia to reverse certain awards.[62] Thus, upon Saudi Arabia's accession to the New York Convention in 1994, the jurisdiction was perceived as being notably hostile toward the enforcement of foreign arbitral awards.[63]

In the dispute between Jadawel International (Saudi Arabia) and Emaar Properties PJSC (UAE),[64] the Board of Grievances conducted an extensive, interventionist review of the commercial arbitration award issued by a tribunal constituted under

[56] Al-Ammari, Martin, *supra* note 48, p. 406.

[57] P. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 The International Lawyer 743 (1988), p. 745.

[58] Al-Ammari, Martin, *supra* note 48, p. 406.

[59] Seyadi, *supra* note 51, p. 191.

[60] Royal Decree no. M/46 [1403 AH, 1983 AD].

[61] In Arabic: *Dīwān al-Maẓālim* (ديوان المظالم).

[62] Al-Ammari, Martin, *supra* note 48, p. 402.

[63] K. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 Fordham International Law Journal 920 (1994), p. 922.

[64] The dispute commenced in 2004 before the Board of Grievances, then it was referred for arbitration in 2006. The ICC issued the award in 2008, and the Board of Grievances issued its final decision in 2009. *Jadawel International (Saudi Arabia) vs. Emaar Property PJSC (UAE)* [2009], Board of Grievances, award not made public. For the details of the case, *see e.g.* Aleisa, *supra* note 11, p. 140; A. Alajlan, A. Mikel, *The Baker McKenzie International Arbitration Yearbook. Saudi Arabia 2017*, Baker McKenzie, Riyadh: 2017, available at: https://www.globalarbitrationnews.com/wp-content/uploads/sites/42/2017/06/Saudi-Arabia.pdf (accessed 30 June 2025).

ICC Rules. The case concerned a dispute that arose from an alleged breach of contract by Emaar Properties (a company working on a construction project). In the aftermath, the claim of almost USD 1.2 billion was dismissed and Jadawel was ordered to pay the costs of arbitration, but when Emaar Properties turned to the Board of Grievances for enforcement of that payment from the Saudi Arabian's company assets, the Board conducted a review so far-reaching that it resulted in the complete overturn of the award and a ruling in favour of Jadawel, not only in terms of costs but also damages (USD 250 million). Unfortunately, the proceedings were not public, and scant information is available on the matter. There is no doubt, however, that it sparked regionwide controversies and concerns as to the certainty of arbitration awards in Saudi Arabia.[65] Indeed, a pronouncement of a rather straightforward nature, ready to be enforced in full, was completely and unexpectedly reversed, in a move shaped by Sharia in matters of arbitration. This very negatively impacted the business dispute resolution system in the Kingdom, causing uncertainty in enforcement proceedings.[66]

It was not uncommon, however, for the Board of Grievances to influence the final award (thus also causing significant delays), as it was fully responsible for ensuring awards' compatibility with Islamic principles, which frequently conflict with contemporary global commerce. Under the old Arbitration Law, judges were able to influence the outcome of arbitration proceedings, often conducting a full retrial (as in the *Jadawel* case) or pushing for re-litigation within the domestic judicial system.[67] When the final decision of the Board was issued in the *Jadawel* case, some voiced the need to further inspect considerations of Sharia in order to better understand and respect its requirements and to further foster economic cooperation between Muslim-majority states and the rest of the world.[68]

2.2. New law, old doubts

The religious references in the legislation of the Kingdom strongly influence the enforcement agenda of Saudi Arabian courts, even though its new regulations, introduced in 2012, are considered some of the most modern and suited to the standards of the New York Convention among Gulf States.[69] They clearly were inspired by the UNCITRAL Model Law on International Commercial Arbitration and designed to facilitate the enforcement of both domestic and international awards. It nonetheless contains provisions which facilitate the special place of Sharia

[65] Alajlan, Mikel, *supra* note 64, p. 371.

[66] *Ibidem*, p. 372.

[67] Al-Ammari, Martin, *supra* note 48, p. 389.

[68] *International Commercial Arbitration in the Deserts of Arabia*, Association for International Arbitration, October 2009, p. 3, available at: https://www.arbitration-adr.org/documents/?i=62 (accessed 30 June 2025).

[69] Seyadi, *supra* note 51, pp. 162, 204.

in the Saudi Arabian legal system, e.g. requiring arbitrators to hold a degree in law (general) or Sharia. However, some adjustments have been made; for example, there is no reference as to the gender of the arbitrator (although the Hanbali maḏhab allows only men to be arbitrators), which suggests that the new law does allow women to serve as arbitrators,[70] thus removing a possible obstacle to enforcement within the Saudi jurisdiction.

The enforcement of a foreign arbitral award has been simplified, with only three grounds for annulment: conflict with any prior judgment or decision of the court; violation of principles of Sharia or the public policy of the Kingdom; and lack of proper notification to the party against whom it will be enforced. That act is supplemented by the Saudi Enforcement Law[71] (in force since 2013), which established special enforcement courts (in lieu of the Board of Grievances). It also provides for more specific requirements for the enforcement of foreign judgments: the tribunal (or court) that made the award is competent to do so (and the Saudi judiciary is not); the parties were properly represented; the judgment is final and not inconsistent with prior Saudi court rulings; and it does not violate national public policy or Sharia. The Board of Grievances has been stripped of its competence to assess awards, and that role was taken over by the Enforcement Department of General Courts.[72] An appellate mechanism has also been introduced, as the decisions of enforcement judges may be challenged. Although the new legislation aims to promote arbitration, especially with international partners, it remains complicated and troublesome, with two-tier proceedings, first to recognise (under the Saudi Arbitration Law) and then enforce (under the Enforcement Law) the award.[73]

The changes in the legislative approach towards enforcement have been welcomed by commentators and generally assessed positively, even though the reform has been scrutinised for allowing a wide interpretation of the public policy exception.[74] It is predicted that the changes should further foster the popularity of arbitration in the Kingdom, which could contribute positively to enhancing the economy.

To date, there has been little record of landmark enforcement cases under the new legislation. A few publications contain mentions of recent disputes, one of them being Etihad Etisalat ("Mobily") versus Mobile Telecommunication Company

[70] F. Nesheiwat, A. Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 Santa Clara Journal of International Law 443 (2015).

[71] Royal Decree No. M/53 [1433 AH, 2012 AD].

[72] Aleisa, *supra* note 11, p. 30.

[73] Al-Ammari, Martin, *supra* note 48, p. 405.

[74] A. Saleem, *A Critical Study on How the Saudi Arbitration Code Could Be Improved and on Overcoming the Issues of Enforcing Foreign Awards in the Country as a Signatory State to the New York Convention*, SSRN, 14 May 2012, p. 12, available at: https://papers.ssrn.com/abstract=2315728 (accessed 30 June 2025).

Saudi Arabia ("Zain").[75] This case is an example of the effectiveness of the new Saudi Arbitration Law, which does not allow for review on the merits of the case. The dispute revolved around a service agreement from 2008 between these two companies, and it was resolved through arbitration in favour of Mobily, although the compensation awarded amounted only to about 10% of the original claim.[76] Both the claimant and the respondent chose not to seek annulment – a move believed to have been motivated by changes in Saudi enforcement regulations,[77] which by 2014 had already precluded the review of awards as to their merits.

Thus, based on the current statutory framework and the outcome of the Etihad case, it appears that the interaction between arbitrators and judges in Saudi Arabia is now focussed predominantly on procedural issues and, secondarily, on matters concerning Sharia compliance. This should not be perceived as a negative development. In the case of enforcing arbitral awards, limiting potential judicial activism may facilitate the creation of a more stable – and thus more attractive – business environment. On the other hand, there is still much space remaining for the judiciary to engage in a conversation on public policy in this context,[78] which may also damage enforcement practice in the state, as demonstrated in the previous section. It is yet to be determined whether awards which are partially non-compliant with Sharia may be refused recognition in their entirety.[79]

When making an arbitral award enforceable in the Kingdom of Saudi Arabia, tribunals must beware of the special requirements of Islamic Sharia, or the litigators must be prepared to strategise the litigation,[80] to ensure compliance with domestic law and Saudi public policy. Otherwise, the implementation of the award will be hindered. The new Arbitration Law, in contrast to its predecessor, leaves rather limited room for judicial review of the merits of an award, only to the extent justifiable by the state's public policy, which seems to be undergoing a thorough redefinition, aimed at balancing the requirements of globalised markets and Islamic legal tradition. Further judgments of enforcement courts should shed more light on the intricacies of Sharia in arbitration, as the judges have a difficult task ahead of them: to explain the content of Islamic law and indicate how future awards should be drafted so as to ensure their swift and effective implementation. On the

[75] Alajlan, Mikel, *supra* note 64, p. 265.

[76] A. White, *Zain / Mobily Arbitration Panel Judgement Rejects 90% of Mobily's SAR2.2 Billion Claim*, LinkedIn, 14 November 2016, available at: https://www.linkedin.com/pulse/zain-mobily-arbitration-panel-judgement-rejects-90-mobilys-white/ (accessed 30 June 2025).

[77] Alajlan, Mikel, *supra* note 64, p. 3.

[78] Aleisa, *supra* note 11, p. 201.

[79] Al-Ammari, Martin, *supra* note 48, p. 407.

[80] Nesheiwat, Al-Khasawneh, *supra* note 70, p. 464.

other hand, it is also the arbitration tribunals' responsibility to issue an award that is enforceable in Saudi Arabia's jurisdiction.

3. IRAQ: WHAT MAY ACCESSION TO THE NEW YORK CONVENTION BRING?

Iraq's jurisprudence on the enforcement of arbitral awards used to be the primary example of legislation that is ill-equipped to accommodate alternative dispute resolution, in both domestic and international settings. Iraqi law does not contain separate provisions for the enforcement of international arbitral awards.[81] Instead, courts apply the Code of Civil Procedure, which allows them to thoroughly review the merits of each award.[82] Before its recent accession to the New York Convention in 2021, the courts strictly and narrowly interpreted the national code, confirming their stern stance on a rather case-by-case basis, even though Iraq is a civil-law state, in which court judgments do not have the power of precedence.[83] This clear favouritism of domestic law was observable even though Iraq is also party to several recognition and enforcement agreements at the regional level, concluded mostly with its Arab counterparts.[84]

3.1. Dealing with arbitral awards pre-ratification

The early days of arbitral award enforcement in modern Iraq were rather uncertain. For example, in the judgment of the Federal Court of Cassation no. 162 of 2012,[85] the court expressly refused to implement an international arbitral award[86] based on Iraqi law on the recognition of foreign judgments, stating that the international arbitral awards do not fall within the scope of those regulations. In the text of the judgment, it differentiated between decisions of foreign courts and awards of arbitration tribunals, emphasising that international arbitral awards should be implemented based on the Code of Civil Procedures, in the same manner as domestic arbitration awards. A year later,[87] that same court also confirmed that the

[81] H.A. Mohammed, N.H. Dahlan, Y. Yusuff, *Legal Issues in the Laws Governing the Enforcement of Foreign Arbitration Awards in Petroleum Disputes in Iraq*, 8 BiLD Law Journal 168 (2023), p. 170.

[82] The applicability of this act is sometimes disputed. *See* F.A.H. Al-Khafaji, H.F.A. Al-Hasoon, *The Concept of Arbitral Award and the Enforcement of Arbitration Awards in the Republic of Iraq*, 17 PalArch's Journal of Archaeology of Egypt/Egyptology 8208 (2020).

[83] Mohammed, Dahlan, Yusuff, *supra* note 81, p. 169.

[84] Al-Khafaji, Al-Hasoon *supra* note 82, p. 8221.

[85] Case 162 [2012], Federal Court of Cassation of Iraq.

[86] Issued by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

[87] Case 108 [2013], Federal Court of Cassation of Iraq.

Iraqi Foreign Judgments Enforcement Act[88] was not applicable to international arbitral awards.

By applying the Code of Civil Procedure, judges are bound to conduct a review of both the procedural and substantive aspects of arbitral awards. Indeed, in the past, Iraqi courts did perform such reviews. For example, in the judgment of the Federal Court of Cassation no. 293 of 2008,[89] the court examined the arbitration process and challenged the arbitrators' assessment of the merits of the case, pointing out that the tribunal allowed as evidence an invalid expert opinion, and the dissenting arbitrator did not provide reasons for their *votum separatum*. As a result, the award was returned to the tribunal. However, Civil Procedure Law[90] also equips the judge with powers to overturn an award and decide on its merits. The Iraqi Federal Court of Cassation did return several judgments to the competent Courts of Appeal to decide on the case in lieu of the tribunal, deeming the arbitrators failure to abide by relevant law a condition that prevented them from amending the ruling.[91] Of course, the reluctance to enforce certain arbitral awards should not imply that Iraqi courts are generally hostile towards alternative dispute resolution systems; on the contrary, they sometimes expressly refer the parties to arbitration.[92] Especially in investment disputes, Iraqi Federal Investment Law allows the parties to engage in arbitration under both Iraqi law and international systems.[93]

There is a noticeable lack of referencing of international law in Iraqi judicial decisions, as the jurisprudential culture of the state does not involve any extensive referencing of international acts.[94] Therefore, enforcement of arbitral awards has been governed strictly by local legislation. In theory, Iraq's international commitments are binding in their original form, as they should be published in the Official Gazette, just as any other laws. However, the international legal order might be seen as competing with Iraqi domestic law and Islamic principles.[95] Therefore, the trend of refusing to recognize awards when arbitrators do not comply with domestic Iraqi law continued at least until the ratification of the New York Convention, with the last ruling being issued in 2021 by the Federal Court of Cassation.[96]

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[88] Law No. 40 on Enforcement [1980].

[89] Case 185 [2008], Federal Court of Cassation of Iraq.

[90] Civil Procedure Law No. 83 [1969].

[91] *See e.g.* Cases 185 [2008], 103 [2007] or 2517 [2019], Federal Court of Cassation of Iraq.

[92] Case 928 [2016], Federal Court of Cassation of Iraq.

[93] S. Shubber, *The Law of Investment in Iraq*, Brill, Boston: 2009, p. 140.

[94] H. A. Hamoudi, *International Law and Iraqi Courts*, in: A. Nollkaemper, C. Ryngaert, E. Kristjansdottir (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States*, Intersentia, Cambridge: 2012, p. 120.

[95] *Ibidem,* pp. 111, 120.

[96] Case 371 [2021], Federal Court of Cassation of Iraq.

3.2. Navigating the post-accession arbitration landscape

Iraq ratified the New York Convention on 31 May 2021. The accession was subject to three main reservations: the principles of reciprocity, non-retroactivity and application only to disputes deemed commercial under Iraqi law.[97] This was implemented into the Iraqi system via publication in the Official Gazette. Hence, from a purely theoretical standpoint, there are no more barriers in applying the text of the Convention directly to enforcement cases brought before Iraqi courts. In the case of a conflict with the Civil Procedure Law, it could be argued that the international agreement constitutes law that is more specific and temporarily supersedes the strict, invasive provisions of municipal law; however, the extent to which this reasoning will be applied is yet to be determined.

So far, the research on post-ratification arbitration has not been satisfactory; the cases are scarce, and official Iraqi case law search engines do not provide many results. For the purposes of this study, the official Iraqi Federal Supreme Court case-law database[98] was searched for records of arbitration award enforcement proceedings. Searches with keywords such as "international arbitration", "arbitration", "New York Convention" and "Enforcement of Arbitral Awards" returned no results. Due to the lack of available detailed court records, the assessment of the judicial approach towards arbitral awards post-accession has so far proven difficult, since no cases have been awarded sufficient media coverage to provide the required legal insights.

Despite the discouraging context, the accession might be the turning point for certain legal issues, especially those related to the precedence of international law on the review of awards. In this case – unlike in Saudi Arabia – arbitrators cannot do much to foster the swifter and smoother enforcement of awards. Domestic tribunals, somehow by default, pay attention to relevant local provisions; usually, the arbitrators are already familiar with them, being practitioners based in the seat of arbitration. However, in the case of arbitration on an international level, it seems less likely that arbitrators could be instructed to decide on a case based on Iraqi law, as they are also bound by the relevant international procedural rules and contract law. Thus, their ability to successfully shape awards to ensure their enforceability in Iraqi territory is rather limited, and the space for engaging with local judges is limited. Additionally, reforming domestic legislation – especially excluding arbitration provisions from the Civil Procedure Law and implementing a separate arbitration

[97] As a side note, it should be mentioned that, according to Mohammed et al., the commercial reservation prevents the application of the Convention to petroleum disputes, which only further negatively impacts the arbitration environment in this state. *See* H.A. Mohammed, N.H. Dahlan, Y. Isa, *The Possibility of Applying the New York Convention to Recognise and Enforce the Foreign Arbitration Awards in Petroleum Disputes in Iraq*, 17(6) Revista de Gestão Social e Ambiental 1 (2023).

[98] *Iraq Federal Supreme Court case-law database*, Iraq Federal Supreme Court, available at https://www.iraqfsc.iq/ethadai.php (accessed 30 June 2025).

law, such as similar acts in the region based on the UNCITRAL Model Law – could further promote the efficient enforcement of arbitral awards in this jurisdiction.[99]

CONCLUSIONS

The Arab region, although it strives to be arbitration-friendly, has not mastered conclusive interactions between tribunals and courts, with the former often disregarding relevant national legislation, especially religion-based provisions, and the latter often ignoring existing international instruments. That being said, positive patterns have been observed, such as the similar understanding of the aims and objectives of arbitration or the recognition of its role in promoting business.

The approaches towards the enforcement of arbitral awards are subjected predominantly to domestic public policy, which is rooted in a legal tradition based on, inter alia, Islam. Although that foundation may seem universal, the various interpretations of Islamic law and the degree to which it is incorporated into a given legal system contribute to a rather fragmented image of the Muslim-majority states. Some of them transposed Islamic principles into the general understanding of justice, as happens to be the case in Egypt; others rely only on Sharia, which gives rise to specific requirements that international actors must fulfil in order to successfully enforce an award, as is the case in Saudi Arabia; still other jurisdictions, such as Iraq, safeguard their legal tradition by relying solely on domestic law, which may hinder the effective implementation of international obligations.

Egyptian courts recognise the New York Convention as a key enforcement framework while proactively safeguarding state assets. The courts and tribunals share common values, seeking to make alternative dispute resolution methods more effective, as long as they remain in line with domestic public policy. However, recent anti-arbitration tendencies may jeopardise this progress, if they continue evolving in the rather interventionist direction.

In Saudi Arabia, arbitral award enforcement depends heavily on compliance with Islamic commercial law, which constitutes the basis of the state's public policy. Sharia requirements limit judges' ability to implement awards if they contradict the Islamic understanding of justice. Saudi legislation stems from a legal system that might be unknown to international arbitrators, and as such they are required to scrutinise Islamic commercial principles in order to frame their verdicts in ways that will be acceptable to national courts.

Iraq's approach to arbitration remains judiciary-centric, with enforcement of arbitral awards being inconsistent and strictly bound by domestic law. Despite

[99] Mohammed, Dahlan & Yusuff, *supra* note 81.

joining the New York Convention over three years ago, there is little evidence of tribunals achieving parity with domestic courts, hindering the adoption of alternative dispute resolution mechanisms.

As such, there is no unified approach to the enforcement of international arbitration awards in the region. However, there are certain patterns that should be taken into consideration by parties seeking enforcement in states rooted in the Islamic legal tradition, revolving around the understanding of conducting fair business. Sharia is a complete legal system, and as such the knowledge of its requirements in commercial transactions is essential to successfully implement arbitral awards in jurisdictions following this system.

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CURRENT STATE AND FUTURE OF INVESTOR–STATE MEDIATION

Abstract: *To protect the investments of their investors abroad, countries began to conclude investment treaties among themselves in the middle of the 20th century. The main feature of such treaties has been the availability of an effective mechanism for resolving disputes between a state and an investor. Most of them provide for arbitration, the effectiveness of which is universally recognised. However, arbitration has come under criticism in recent years. Among the main reasons are the inconsistency of awards, the high cost and long duration of proceedings, the lack of transparency and other issues. Due to that, practitioners and scholars call for reform and suggest, inter alia, resorting to investor–state mediation. In this regard, many developments have been made to increase the use of mediation in future. For example, the Working Group III reform is currently taking place, the Singapore Convention has been signed, arbitration rules and guidelines have been issued, etc.*

Keywords: ADR, arbitration, mediation, investor–state dispute settlement, Working Group III

INTRODUCTION

Investment plays an extremely important role in the development of all countries. Any country that aims to develop is interested in attracting foreign investors to invest in it. However, investing in unstable economies may not always be a good idea for a foreign investor. In addition to business risks, this is due to the unpredictability of governments' actions. There have been many cases where a government expropriated the investor's property, imposed excessive taxes, applied other arbitrary measures, etc.[1]

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[1] *E.g.* arbitral awards in the following cases: Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014 (Russian courts, acting in bad faith, launched criminal cases against Yukos for tax evasion, which ultimately led to the company's bankruptcy);

In the past, when such cases happened, the only remedies available to the foreign investor were to rely on their home state for diplomatic protection or to apply to the domestic court of the host state. Nevertheless, neither measure is very effective nor guarantees fair compensation for the actions of the host state. To change this and provide reliable protection for investment, states began to conclude investment treaties between themselves, containing certain guarantees of protection for investments. The first bilateral investment treaty (BIT) was concluded between Germany and Pakistan in 1959, and other states followed this example. Many BITs were signed during the 1960s.[2]

Initially, such treaties were mostly signed between developed and developing countries. The priority for developing countries was to attract more foreign investment, while for the developed countries it was to ensure protection for their investors in foreign countries.[3] The paradigm then shifted, and now there are many BITs between two developing countries as well as between two developed ones.[4] Frequently, some investment guarantees are contained in other bilateral treaties between states (not related to investments only) or multilateral treaties between many states (e.g. trade agreements). As of March 2025, there have been more than 3,300 BITs or other treaties with investment provisions (TIPs).[5]

As a rule, investment agreements include provisions on the prohibition of expropriation without compensation, fair and equitable treatment, free transfer of capital, full protection and security, etc. More importantly, most investment treaties envisage a mechanism of dispute resolution between a foreign investor and a host state, usually providing an investor with recourse to international arbitration. For example, the UK Model BIT (2008) contains the following dispute settlement provision:

> Settlement of Disputes between an Investor and a Host State
>
> Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period

CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003 (the Media Council, a body of Czechia, replaced the operator of a broadcasting station, which was partly owned by the Claimant, on questionable grounds and destroyed its investment); Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I), SCC Case No. 116/2010, Award, 19 December 2013 (Kazakhstan cancelled oil and gas exploration contracts held by the Claimant's local operating companies, after which its Kazakh assets were seized).

[2] A. Ghouri, *The Evolution of Investment Treaties*, in: A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Wolters Kluwer, Alphen aan den Rijn: 2015, p. 24.

[3] *Ibidem*, pp. 14, 24.

[4] *Ibidem*, pp. 24–25.

[5] *International Investment Agreements Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 30 June 2025).

> of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.[6]

International arbitration became a primary method of resolving disputes between investors and host states, as it confirmed its effectives for resolution of such politically sensitive disputes. The other most commonly used method for resolving investment disputes is negotiation, which the parties may engage in before, during, or even after arbitration. One commentator noted that "it seems that parties [in investment disputes] drive on a two-lane road" and "[w]hen changing lanes, they move directly from negotiation to investor–State arbitration and sometimes back again."[7]

Despite this, in recent years, scholars and practitioners have often criticised investor–state dispute settlement system (ISDS) and in particular investor–state arbitration, emphasising the need for reform.[8] The main issues they point to are the inconsistency of arbitral awards, the high cost and long duration of arbitral proceedings, the lack of transparency and other problems. As for possible solutions, some of them have called for resorting to other methods of dispute resolution in ISDS, the most obvious option of which is investor–state mediation. In this regard, many developments have occurred at the international level aiming to increase the use of investor–state mediation.

The article discusses investor–state mediation and the main developments that have taken place in recent years. It is divided into two main parts. Section 1 describes the main peculiarities of investor–state mediation, how it is conducted, its strength and concerns about it, as well as its current place in ISDS. Section 2 discusses the main developments on investor–state mediation in recent years and how they address existing concerns on mediation. Thus, the article provides an overview of the current state of investor–state mediation and assesses how all these developments may influence its future, i.e. increase its use in ISDS.

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[6] Draft Agreement Between the Government of United Kingdom of Great Britain and Northern Ireland and the Government X for the Promotion and Protection of Investment (adopted in 2008) (emphasis added).

[7] J. Jung, *Investor–State Mediation – A Third Lane on the ISDS Highway?*, 40(2) ASA Bulletin 273 (2022).

[8] *See generally* M. Waibel, A. Kaushal, K-H.L. Chung, C. Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, Wolters Kluwer, Alphen aan den Rijn: 2010; A. Anderson, B. Beaumont (eds.), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*, Wolters Kluwer, Alphen aan den Rijn: 2020. *See also EESC Backs Criticism of Investor-State Dispute Settlement (ISDS), and Calls for a More Holistic Approach*, European Economic and Social Committe, 7 November 2022, available at: https://www.eesc.europa.eu/en/news-media/news/eesc-backs-criticism-investor-state-dispute-settlement-isds-and-calls-more-holistic-approach (accessed 30 June 2025).

1. INVESTOR–STATE MEDIATION AS AN ALTERNATIVE TO INVESTOR–STATE ARBITRATION

1.1. What is investor–state mediation?

Mediation is a form of alternative dispute resolution which envisages resolving disputes between the parties with the help of a neutral third party, a mediator, that assists the parties in establishing communication and coming to a joint solution. Mediation in its modern sense began to develop in the second half of the 20th century, primarily in common-law countries: the USA, Australia, Great Britain – and later in other countries. Nonetheless, certain procedures similar to mediation were practiced even in Ancient Rome, Greece, Medieval Europe, etc.[9]

In general, the idea of mediation is that in cases where the parties seek a de-escalation or, ideally, a quick end to ongoing controversies in order to continue their business or decently separate, they can choose to take responsibility for their own fate by cooperatively negotiating a mutually acceptable solution with the assistance of a neutral third party.[10] It is worth noting that mediation is not limited to consideration of disputes; its main purpose is to provide the parties with means to increase the effectiveness of negotiations through the involvement of a neutral party. It helps to find a mutually beneficial compromise when the parties are in conflict or faced with certain difficulties. Therefore, the key players in mediation are not neutral persons, legal advisors, witnesses or other participants in the process, but the parties themselves. Mediation only makes sense and can be successful if the parties want it and if it suits them to solve the difficulties they have faced.[11]

Mediation can be used to resolve any disputes, including those in civil, labour and even criminal cases. In recent years, it has also become a worthy alternative to arbitration in the resolution of international commercial disputes. Many arbitral institutions have issued arbitration rules and began to administer mediation cases, e.g. SCC Arbitration Institute, International Chamber of Commerce, London Court of Arbitration, Hong Kong International Arbitration Centre and others.

As for investor–state mediation specifically, it entails the resolution of investment disputes through the process of mediation between one private party (or more), and a sovereign state.[12] Investor–state mediation is suitable for resolving all the same

[9] R. Karpenko, *Historical Background of Implementation of Mediation in Ukraine and Other Countries*, 4 Entrepreneurship, Economy and Law 28 (2020), p. 29.

[10] Jung, *supra* note 7.

[11] J.-F. Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in: J.-C. Goldsmith, A. Ingen-Housz, G. Pointon (eds.), *ADR in Business: Practice and Issues across Countries and Cultures I*, Wolters Kluwer, Alphen aan den Rijn: 2006, pp. 21–23.

[12] T.-K. IU, *Is Investor–State Mediation an Emerging Practice? A Practitioner's Perspective*, Kluwer Mediation Blog, 16 October 2019, available at: https://mediationblog.kluwerarbitration.com/2019/10/16/is-investor-state-mediation-an-emerging-practice-a-practitioners-perspective/ (accessed 30 June 2025).

issues as investor–state arbitration. In particular, it can be used to resolve disputes concerning changes in investment incentive measures, termination or interference with a contract by the state, revocation of licences or permits, unexpected tariffs or taxation, etc.[13]

Also, it is necessary to distinguish between mediation and conciliation (which is also sometimes used for resolving investor–state disputes) because these concepts are rather similar and sometimes used interchangeably. At the International Centre for Settlement of Investment Disputes (ICSID), the two processes have the following differences:

- Once consent has been granted, a party cannot withdraw unilaterally from conciliation. In turn, consent for mediation is necessary not only at the beginning, but also throughout the entire mediation process. Either party has the right to withdraw from the mediation at any point.[14]
- In ICSID mediation, the mediator's role is limited to assisting the parties in reaching a mutually acceptable solution for all or some of the disputed issues. On the other hand, in ICSID conciliation, the conciliation commission has a broader mandate, which is to facilitate resolution as well as clarify the issues in the dispute.[15] It is important to note that neither the mediator nor the conciliator have the authority to take decisions on the merits.
- In contrast to conciliation, a party cannot file an objection that the mediator does not have jurisdiction to consider the dispute, as the process is entirely voluntary. This enables both parties and the mediator to concentrate on resolving the disputed issues.[16]
- Mediation is a more informal process compared to conciliation, as a mediator has no authority to issue procedural orders or decisions.[17]

1.2. How is investor–state mediation conducted?

To understand how the mediation of investment disputes is conducted, it is worth considering the ICSID Mediation Rules. The ICSID adopted these Rules in 2022, marking the first institutional mediation rules designed specifically for investment disputes.[18]

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[13] *Ibidem.*

[14] *Key Differences between Mediation and Conciliation at ICSID*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation (accessed 30 June 2025).

[15] *Ibidem.*

[16] *Ibidem.*

[17] *Ibidem.*

[18] *Rules and Regulations – Mediation*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

1.2.1. Consent to mediation

The main condition of mediation, as in the case of arbitration, is the consent of the parties to recourse to this procedure. Such consent may be included in investment agreements between a state and an investor, or in BITs or TIPs between states. As with investor–state arbitration, the consent of a state in bilateral or multilateral investment agreements is asymmetrical in nature, as a BIT or TIP is a treaty concluded between states, and not between a state and an investor. It is generally accepted that such a provision is only an offer by the state to the investor to refer to arbitration/mediation if a dispute arises.[19]

An example of such consent to mediation can be found in the Costa Rica–United Arab Emirates BIT (2017). Art. 14(3) of the Treaty provides that "[i]n the event that an investment dispute cannot be settled by consultations and negotiations [...] within three months after the respondent received the notice of dispute, it shall be submitted to a third-party procedure such as conciliation and mediation."[20]

According to the ICSID Mediation Rules, a party to the dispute may submit a request for mediation even without the consent of the other party.[21] However, if the other party rejects the offer to mediate or fails to accept the offer to mediate during the specified period, the Secretary-General will inform the parties that no further action will be taken on the request.[22]

1.2.2. Confidentiality of proceedings

As a general rule, all information related to mediation proceedings shall be confidential unless the parties agree otherwise, the information or document is independently available or disclosure is required by law.[23] Additionally, a party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made or views expressed by the other party or the mediator during mediation, unless the parties agree otherwise.[24]

1.2.3. Mediator

Besides the parties, the figure of utmost importance in mediation is the mediator. When the parties choose to use mediation, they basically entrust the mediator to

[19] L. Boisson De Chazournes, *Consent in Investment Arbitration: A Few Remarks*, Kluwer Arbitration Blog, 13 January 2023, available at: https://arbitrationblog.kluwerarbitration.com/2023/01/13/consent-in-investment-arbitration-a-few-remarks/ (accessed 30 June 2025).

[20] Agreement Between the Government of the United Arab Emirates and the Government of the Republic of Costa Rica for the Reciprocal Promotion and Protection of Investments (adopted on 3 October 2017, entered into force 21 October 2020).

[21] Rule 6(1) of the ICSID Mediation Rules (2022).

[22] *Ibidem*, Rule 6(5).

[23] *Ibidem*, Rule 10(1).

[24] *Ibidem*, Rule 11.

design and manage a balanced process of communication and negotiation, based on rules proposed and agreed by the parties. In most cases, mediators are also law practitioners, managers, economists, engineers, psychologists, professors or professionals in another field.[25]

According to the ICSID Mediation Rules, the mediator shall be impartial and independent of the parties, and the parties may agree that the mediator shall have specific qualifications or expertise.[26] Unlike in investor–state arbitration, where there can only be an odd number of arbitrators (predominantly one or three), the ICSID Mediation Rules determine that there shall be one mediator or two co-mediators, where each mediator shall be appointed by agreement of the parties.[27] The Rules also prescribe an order of appointment, resignation, and replacement of a mediator, which is very similar to investor–state arbitration.[28]

1.2.4. Mediation proceedings

Chapter V of the Rules addresses how mediator(s) and parties should conduct the mediation process. The key provisions are as follows:

- The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the disputed issues. The mediator has no authority to impose a resolution of the dispute on the parties (Rule 17(1)).
- Each party shall file a brief written statement with the Secretary-General describing the initial issues in dispute and their views on these issues and the procedure to be followed during the mediation (Rule 19(1)).
- The mediator shall hold the first session with the parties within 30 days after the date of the transmittal of a request for mediation. At the first session, after consulting with the parties, the mediator shall determine the protocol for conducting the mediation, including procedural language, the place of meeting, whether meetings will be held in person or remotely, the participation of other persons in the mediation, the process that would be followed to conclude and implement a settlement agreement, etc. (Rule 20).
- The mediator, or the Secretary-General if no mediator has been appointed, shall issue a notice of termination of the mediation if 1) the parties have concluded a settlement agreement; 2) the parties have agreed to terminate the mediation; 3) one of the parties has decided to withdraw from mediation, unless the remaining parties agree to continue; 4) the mediator has determined

[25] C.-A. Gavrila, *The Roles of the Mediator*, adigavrila, available at: https://www.adigavrila.com/en/blog/the-roles-of-the-mediator/ (accessed 30 June 2025).

[26] Rule 12 of the ICSID Mediation Rules (2022).

[27] *Ibidem*, Rule 13(1).

[28] *Ibidem*, Rules 13–15.

that there is no likelihood of resolution through the mediation; or 5) the parties have not taken any steps to appoint a mediator within 120 days after the date of registration (Rule 22).

If the mediation is successful, the process results in a settlement being agreed by the parties, which is then subject to the applicable approval processes the parties identified at the first session.[29] An investor might need to obtain internal approval within the company, while for a host state, approval is typically required from relevant government authorities or agencies.

1.3. Strengths of investor–state mediation compared to arbitration

Mediation has some obvious strengths compared to arbitration. Although investor–state arbitration is and likely always will be the primary method of resolving investment disputes, its main shortcomings are cost and the duration of proceedings.

According to a survey by the British Institute of International and Comparative Law (BIICL), the average costs of investor–state arbitration are around USD 6.4 million for the investor and USD 4.7 million for the respondent state. The average tribunal costs in ICSID and ad hoc arbitrations amount to USD 958,000 and USD 1.05 million, respectively. If one of the parties initiates annulment proceedings, both parties will have to spend an additional USD 1.3 to 1.4 million.[30]

As for the duration of proceedings, according to data from the BIICL survey, the average length of investor–state arbitration proceedings is 4.4 years, though it directly depends on the value of the claim. For example, disputes with a value of up to USD 50 million lasted a maximum of 3.6 years, while disputes with a value exceeding USD 1 billion lasted up to 8 years.[31]

Despite the uniformly accepted effectiveness of arbitration, the parties may often want to avoid the years of dispute resolution in arbitration and the significant costs of arbitration proceedings. In this case, mediating investment disputes is an excellent alternative, because its duration and cost are much lower.

Other strengths of investor–state mediation compared to investor–state arbitration are as follows:

– *The ability of the parties to formulate an outcome.* Critics of investor–state arbitration often emphasise the unpredictability of decisions by international

[29] *Conduct of the Mediation – Facilitated Dialogue – ICSID Mediation (2022)*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/procedures/mediation/conduct-of-mediation/2022 (accessed 30 June 2025).

[30] M. Hodgson, Y. Kryvoi, D. Hrčka, *2021 Empirical Study: Costs, Damages and Duration in Investor–State Arbitration*, British Institute of International and Comparative Law, London: 2021, p. 4, available at: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf (accessed 30 June 2025).

[31] *Ibidem*, p. 32.

tribunals.[32] And although this issue is debatable, given the number of investment treaties and the specifics of each case, during mediation the parties can avoid any unpredictability as they are the ones who formulate the outcome of the mediation.

– *Preserving the parties' relationships.* Mediation is suitable for those parties who, despite the controversy, want to maintain good relations between each other. This is possible due to the fact that the parties make decisions by mutual consent, which can be beneficial for both.[33] For example, given that the respondent in investment disputes is in most cases a developing country, mediation could help that country retain investments that are necessary for its development.

At the same time, mediation also has advantages due to which the parties choose arbitration, namely:

– *Confidentiality.* As already mentioned in section 1.2.2, it is generally accepted that mediation proceedings are confidential. It is possible, however, that the general rule of confidentiality in investor–state mediation will be revised in future. This is discussed in more detail in section 1.4 – "Concerns about investor–state mediation".
– *Selection of a mediator/co-mediators.* Just as in arbitration, in mediation the parties can choose a neutral party to help them resolve the dispute.
– *Flexibility.* Flexibility is manifested in the fact that the parties can fully control the dispute resolution process: choose mediators/arbitrators, determine the hearing date, agree on confidentiality issues, etc. This feature is inherent in both arbitration and mediation, and is a major advantage of alternative dispute resolution methods (ADR) compared to domestic litigation.

1.4. Concerns about investor–state mediation

Despite such strengths, some scholars and practitioners have certain concerns about investor–state mediation. The first of them is the aforementioned confidentiality, which is an integral feature of mediation and one of its main strengths. The main concern is that there has been considerable debate about increasing transparency in investment disputes in recent years. Transparency means that the public may be notified of, obtain information about and possibly take part in arbitral proceedings

[32] *See* B. Arp, *Comparing Criticism to International Adjudication across Investment, Trade, and Human Rights Dispute Settlement Mechanisms*, in: B. Arp, R. Arturo Polanco Zamora (eds.), *International Arbitration in Times of Economic Nationalism*, Wolters Kluwer, Alphen aan den Rijn: 2022, pp. 103–105.

[33] M. Dumanova, P. Neuburger, *Beyond Investment Arbitration: Investment Mediation as a "New Light"*, International Bar Association, 21 October 2022, available at: https://www.ibanet.org/beyond-investment-arbitration-investment-mediation-new-light#_edn23 (accessed 30 June 2025).

established to decide a claim made by a foreign investor.[34] In this regard, the most remarkable are the recent efforts by the United Nations Commission on International Trade Law (UNCITRAL), which introduced their Rules on Transparency in Treaty-based Investor–State Arbitration (Transparency Rules) in 2013, established the Transparency Registry and developed the Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention).[35]

Due to that, the widespread acceptance of confidentiality in mediation may be seen as conflicting with the trend towards transparency and accountability in investment dispute resolution, as these disputes can encompass substantial public policy issues with consequences for a nation's regulatory decisions and fiscal duties.[36] Some commentators also assume that investor–state mediation can be a convenient method to avoid the high levels of transparency currently typical of investor–state arbitration.[37]

The second major concern is about politics, namely that some politicians may interpret the admission of responsibility as a defeat and, thus, be cautious to take such unpopular decisions.[38] This is also closely connected with the third concern: the lack of national-law frameworks on mediation. The lack of internal policies or regulations concerning mediation generates ambiguity for government officials when it comes to dealing with mediation. For instance, state officials face challenges in determining whether to engage in mediation; if they do so, issues arise regarding the delegation of authority, such as identifying responsible parties for negotiation or settlement or securing a budget for mediation.[39]

Last but not least is the lack of awareness. Not everyone involved in the resolution of investment disputes, e.g. politicians, is acquainted with mediation and its main advantages.

1.5. Current place of investor–state mediation in ISDS

Considering the provisions of international investment treaties and case statistics, it is clear that mediation is not a predominant method of dispute resolution in

[34] E.U. Moneke, *The Quest for Transparency in Investor–State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?*, 86(2) International Journal of Arbitration, Mediation and Dispute Management 157 (2020), p. 163.

[35] *Ibidem*, p. 158.

[36] D. Morris, *ICSID Publishes New Materials on Mediation in Investment Disputes*, WilmerHale, 5 August 2021, available at: https://www.wilmerhale.com/en/insights/client-alerts/20210805-icsid-publishes-new-materials-on-mediation-in-investment-disputes (accessed 30 June 2025).

[37] S.F. Ali, O.G. Repousis, *Investor–State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat*, 45 Denver Journal of International Law and Policy 225 (2017), pp. 228–229.

[38] Morris, *supra* note 36.

[39] Dumanova, Neuburger, *supra* note 33.

ISDS and that the two most common methods are negotiation and, of course, arbitration. Nonetheless, it is also clear that mediation has the potential to become a third power in ISDS.

1.5.1. Provisions on mediation in investment treaties

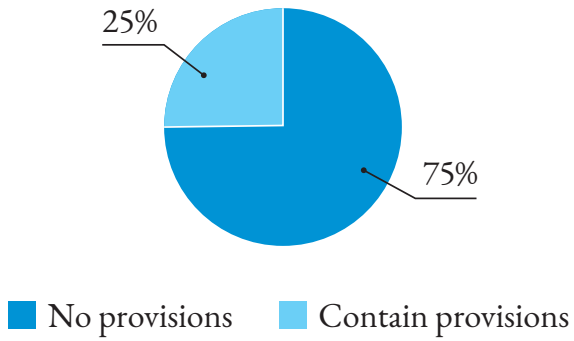
Although arbitration is a primary method of dispute resolution in investment treaties, some of them contain so-called multi-tiered resolution clauses, which outline the steps that must be followed before an investor can resort to arbitration. In recent years, there has been a trend to expressly provide for amicable dispute resolution within such clauses, some of which include mediation.

According to one ICSID study,[40] such clauses can be divided into five categories:

- clauses with an amicable settlement period prior to the institution of arbitration
- clauses that expressly permit mediation or another specified amicable dispute resolution mechanism prior to arbitration
- clauses encouraging the use of mediation or other amicable dispute resolution mechanisms in the amicable settlement period
- clauses mandating mediation or other amicable dispute resolution mechanisms prior to arbitration
- clauses permitting mediation at any point in time.

However, as statistics show, provisions on either conciliation (in most cases) or mediation are found in only 631 treaties, which is less than 25% of the treaties.[41]

Figure 1. Provisions on Conciliation/Mediation in Investment Treaties



[40] *Overview of Investment Treaty Clauses on Mediation*, International Centre for Settlement of Investment Disputes, 12 July 2021, available at: https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation (accessed 30 June 2025).

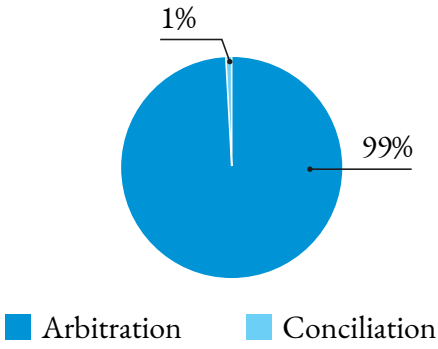
[41] *International Investment Agreements Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 30 June 2025).

1.5.2. Use in practice

The statistics regarding the consideration of disputes in the ICSID are not in favour of mediation either. Since the adoption of the ICSID Mediation Rules in 2022, no mediation proceeding has been registered. However, considering the limited time that has passed, it is difficult to draw any relevant conclusions yet.

At the same time, we can consider the use of conciliation in the ICSID, given its similarity to mediation. Conciliation, together with arbitration, has been available for investors since the establishment of the Centre in 1966; yet, as of March 2025, only 15 conciliation cases have been considered or are pending in the ICSID. This figure is significantly lower than the 1,051 arbitration cases that have been resolved or are pending in the ICSID.[42]

Figure 2. ICSID Arbitration v. Conciliation Cases



1.5.3. Hidden potential?

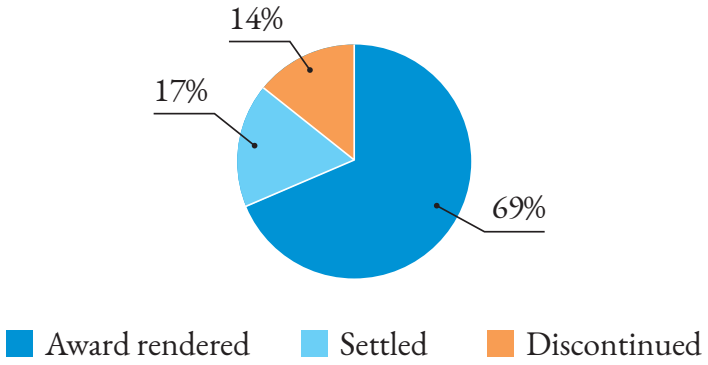
Nonetheless, there are a few indicators that confirm the potential of investor–state mediation and show positive changes in the attitude of investors and states towards it. According to the 2020 Queen Mary University of London and Corporate Counsel International Arbitration Group (QMUL-CCIAG) Survey: Investors' Perceptions of ISDS, 55% of respondents have a positive attitude towards investor–state mediation. For comparison, 53% of respondents have a positive attitude towards negotiations versus 73% and 81% towards treaty- and contract-based arbitration, respectively. In turn, only 23% of respondents have a positive attitude towards litigation of investment disputes in host-state courts and 46% towards governmental intervention on behalf of an investor.[43]

[42] *Search Cases*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/cases/case-database (accessed 30 June 2025).

[43] *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS*, Queen Mary University of London, London: 2020, p. 7, available at: https://www.qmul.ac.uk/arbitration/research/2020-isds/ (accessed 30 June 2025).

Additionally, according to statistics from the United Nations Conference on Trade and Development (UNCTAD), there is a significant demand in ISDS for peaceful resolution of disputes: one third of all disagreements end with the dispute being settled or discontinued. According to UNCTAD statistics (as of July 2024), out of 1,025 cases considered, 179 were settled and 140 were otherwise discontinued.[44]

Figure 3. Total Arbitration Cases Concluded



The increase in provisions providing for mediation in investment treaties over the last decade is also promising.[45] For example, Italy, Canada and the Belgium-Luxembourg Economic Union included mediation in their newest model BITs.[46] Thus, although mediation is significantly inferior to negotiation and arbitration in ISDS at the moment, the survey and the statistics indicate that it has great prospects and that it can become the third main method for resolving investment disputes.

2. REACHING POTENTIAL: THE WORKING GROUP III REFORM AND OTHER DEVELOPMENTS TO INCREASE THE USE OF INVESTOR–STATE MEDIATION

Given the criticism of investor–state arbitration and the potential for mediation to become a decent alternative to it, many developments have taken place in the last

[44] *Investment Dispute Settlement Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 30 June 2025).

[45] *See Overview of Investment Treaty Clauses on Mediation*, International Centre for Settlement of Investment Disputes, Washington: 2021, p. 2, available at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf (accessed 30 June 2025). *See also* Jung, *supra* note 5.

[46] *See* Agreement Between the Government of the Italian Republic and the Government of X for the Promotion and Protection of Investments (adopted in August 2022); Agreement Between Canada and X for the Promotion and Protection of Investments (adopted on 12 May 2021); Agreement Between the Belgium-Luxembourg Economic Union, on the One Hand and X, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (adopted on 28 March 2019).

decade to promote mediation in ISDS. Many respected international organisations and arbitral institutions took part in this. The most important developments are the Working Group III (WG III or Working Group) reform, the adoption of the Singapore Convention and the issuance of mediation rules and guidelines by arbitral institutions and non-governmental organisations.

2.1. Recent developments to increase the use of investor–state mediation

2.1.1. The WG III reform

2.1.1.1. What does the WG III reform entail?

The WG III was established by UNCITRAL in 2017 to pursue the reform of ISDS and address the current concerns about the regime. The work of the WG III was divided into three phases: (a) identify and consider concerns regarding ISDS; (b) consider whether reform was desirable in the light of any identified concerns; and (c) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[47] The first and second stages were completed, with the Working Group having determined that reform is desirable. Such reform is considered necessary to respond to a range of issues that were identified and discussed during the meetings.[48]

During the first stage, the WG III identified the following main concerns about the ISDS regime: (a) inconsistency in arbitral decisions; (b) limited mechanisms to ensure the correctness of arbitral decisions; (c) a lack of predictability; (d) the parties' appointment of arbitrators; (e) the impact of party appointment on the impartiality and independence of arbitrators; (f) a lack of transparency; and (g) the increasing duration and costs of the procedure. Many states[49] and organisations[50]

[47] UN, *Report of the United Nations Commission on International Trade Law*, 3–21 July 2017, A/72/17, para. 264.

[48] E. Shirlow, *UNCITRAL Working Group III: An Introduction and Update*, Kluwer Arbitration Blog, 23 March 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/03/23/uncitral-working-group-iii-an-introduction-and-update/ (accessed 30 June 2025).

[49] *See* UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-fifth Session, Fifty-sixth Session (3–21 July 2023)*, A/CN.9/1131, 14 April 2023, para. 4. This session was attended by the following states, among others: Algeria, Argentina, Armenia, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Hungary, India, Indonesia, Iraq, Israel, Italy, Japan, Malawi, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, South Korea, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, and Uganda.

[50] *Ibidem*, para. 7. This session was attended by the following organisations, among others (including non-governmental ones): Economic Commission for Latin America and the Caribbean, International Centre for Settlement of Investment Disputes, United Nations Conference on Trade and Development, African Development Bank, Commonwealth Secretariat, American Arbitration Association/International

attended the meetings and submitted their suggestions regarding possible ways to improve the current system.

To address them, the WG III is currently considering the following possible reforms, among others: (a) establishing a Multilateral Investment Court or Appellate Mechanism; (b) establishing an Advisory Centre; (c) increasing the use of investor–state mediation; and (d) creating a Code of Conduct for adjudicators.

2.1.1.2. Considerations for increasing the use of investor–state mediation

In submissions to the WG III, states emphasised the need to explore mediation and other alternative dispute resolution methods. Most submissions referring to alternative dispute resolution methods highlighted the fact that they are more effective than arbitration in terms of time and costs, and their increased use would therefore address concerns regarding the cost and duration of ISDS. In addition, the countries indicated that alternative dispute resolution methods can preserve long-term relationships and that mediation usually helps clarify the positions of the disputing parties, thereby reducing the gap between them and allowing them to focus on the issues at stake.[51]

However, according to the WG III, very few treaties offer mediation and even fewer regulate the mediation procedure. If the investment treaty does not refer to mediation, the parties need to conclude a separate agreement for mediation, which requires additional effort, time and the necessary authority for government officials to engage in mediation. As an example of the obstacles to using mediation, the WG III also mentioned the difficulties in coordinating among the state agencies during mediation proceedings, the legal certainty required for officials to be involved in such proceedings and the need to ensure that the necessary approval process was established, including that those negotiating the settlements had the necessary authority to agree to a settlement agreement.[52]

Therefore, it was decided to develop the legal framework for encouraging mediation and to adopt (a) draft provisions on investment mediation and (b) draft guidelines in mediation. These, according to the WG III, should help increase the

Centre for Dispute Resolution, Cairo Regional Centre for International Commercial Arbitration, Center for International Investment and Commercial Arbitration, Stockholm Chamber of Commerce Arbitration Institute, Third World Network, United States Council for International Business, and Vienna International Arbitration Centre.

[51] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution, Note by the Secretariat, Thirty-ninth session* (*30 March–3 April 2020)*, A/CN.9/WG.III/WP.190, 15 January 2020, paras. 29–31.

[52] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-third session (5–16 September)*, A/CN.9/WG.III/WP.217, 13 July 2022, paras. 11–12.

usage of mediation in ISDS.[53] It is important to note that the draft provisions and guidelines have not yet been officially adopted, so the final version may still be subject to change. The work of WG III is due in 2026.

A) Draft provisions on mediation

The draft provisions on mediation were prepared for possible inclusion in investment treaties or a multilateral instrument on ISDS reform, and as such would need to be adjusted if they were to become part of mediation rules or national legislation.[54] The WG III suggests including provisions regarding the following aspects:

- *Availability of mediation and level of conduciveness.* The WG III proposes option A and option B of such a provision. Option A envisages a consent-based, voluntary provision: "The parties shall consider mediation as a means of settling an international investment dispute amicably."[55] In turn, option B provides that after receiving a written request from one of the parties, mediation would automatically commence: "A party shall send a request in writing to the other party to commence mediation to settle an international investment dispute. The mediation is deemed to commence upon receipt of the request by the other party."[56] Both options include a definition of mediation and a list of available mediation rules that the parties could refer to. Unlike option A, option B provides a number of default rules in case the parties have not yet agreed or are unable to agree on a set of mediation rules.[57]
- *Information required in an invitation or request.* The draft version of provision 2 prescribes information to be contained in an invitation to mediate (according to draft provision 1, option A) and a request to commence mediation (according to draft provision 1, option B): (a) the name and contact details of the party and its legal representative(s); (b) a description of the factual basis of the dispute; (c) the government agencies and entities that have been involved in the matters giving rise to the dispute; and (d) a description of any prior steps taken to resolve the dispute, including any pending claims.[58]

[53] *Ibidem*, paras. 11–12; UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation, Note by the Secretariat, Forty-third Session (5–16 September 2022)*, A/CN.9/WG.III/WP.218, 20 July 2022, paras. 1–2.

[54] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation, Note by the Secretariat, Forty-third Session (5–16 September)*, A/CN.9/WG.III/WP.217, 13 July 2022, para. 15.

[55] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 3.

[56] *Ibidem*.

[57] *Ibidem*, para. 5.

[58] *Ibidem*.

- *Relationship with arbitration and other dispute resolution proceedings.* The WGIII showed strong support for a provision which envisages the automatic stay of arbitration, litigation or other proceedings if mediation is commenced, without the need for a separate agreement by the parties. The rationale behind this proposal was that such an automatic stay would minimise the likelihood of conflicts arising between the ongoing legal proceedings and would enable the disputing parties, especially states with limited resources, to focus more on mediation. Paragraph 1 of the provision prescribes that commencement of mediation shall halt any other dispute resolution proceedings. Paragraph 2 states that the parties need to notify the arbitral tribunal or the court in writing to trigger the suspension of a set of proceedings, and this notification is subject to the applicable rules of those proceedings.[59]
- *Confidentiality of mediation proceedings.* The Working Group emphasised the need to find a balance between transparency and confidentiality in mediation. The default rule under draft provision 4 is that all information related to mediation proceedings is confidential. Nonetheless, there are a few exceptions: (a) the information or document is independently available; (b) disclosure is required by law; (c) a party may disclose the fact that mediation is taking place or has taken place; and (d) a party may disclose the outcome of the mediation, including any settlement agreement.[60]
- *Without prejudice provision.* If mediation does not result in a settlement and a party initiates arbitration or other proceedings, the views, suggestions, admissions or willingness to reach a settlement expressed during the proceedings shall not be used to the detriment of the party who expressed them. For that, the WG III included the provision that engaging in mediation is without prejudice to the legal position or rights of a party in any other dispute resolution proceedings.[61]
- *Settlement agreement.* According to draft provision 6, the parties shall ensure that a settlement agreement resulting from mediation meets the requirements set forth in the Singapore Convention on Mediation. By this provision, the WG III aims to facilitate the enforcement of settlement agreements in any state party to the Singapore Convention that has not made a reservation provided for in Art. 8(1)(a) (that a party shall not apply this Convention to settlement agreements to which it is a party).[62]

[59] *Ibidem*, para. 6.
[60] *Ibidem*, paras. 6–7.
[61] *Ibidem*, para. 7.
[62] *Ibidem*, para. 8.

B) Draft guidelines on investment mediation

The guidelines are considered a useful educational and awareness-raising tool to promote the use of mediation. It was stated that the draft guidelines on investment mediation would be prepared as a stand-alone document independent from the draft provisions on mediation.[63] According to one of the reports of the WG III, the purpose of the draft guidelines is to explain how mediation can be utilised to resolve investment disputes and that the draft guidelines are not intended to promote any best practice, but rather to list and briefly describe issues that should be considered when undertaking investor–state mediation.

The draft guidelines explain the suitability of mediation to resolving an investment dispute, the timing and duration of mediation, the role of institutions, the role, qualification and appointment of a mediator, the role of the parties and other participants, the treatment of information and other topics.[64]

2.1.2. The Singapore Convention on Mediation

One of the greatest advantages of arbitration over other dispute resolution methods is the availability of an effective mechanism for recognising and enforcing arbitral awards in most countries of the world. This is made possible by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides for the enforcement of arbitral awards, subject to limited exceptions. ICSID awards, on the other hand, can be enforced through the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention), which stipulates that an award rendered under this Convention should have the same status as a final judgment of a court in any of its member states.

In 2020, mediation received its "own" alternative: the UN Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention. This is a multilateral treaty, which provides a uniform, efficient way to enforce and invoke international settlement agreements resulting from mediation. The Convention was developed by the UNCITRAL Working Group II (WG II), which focussed on the issue of enforcing international settlement agreements resulting from mediation proceedings. The Group worked from 2015 to 2018, and in December 2018 the United Nations General Assembly unanimously

[63] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-third Session, Fifty-sixth Session (5–16 September 2022)*, A/CN.9/1124, 7 October 2022, para. 173.

[64] *See* UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.227, 17 January 2023.

passed a resolution to adopt the Singapore Convention.[65] As of March 2025, 57 states have signed it and 15 have ratified it.[66]

2.1.2.1. Main features of the Convention

The Singapore Convention has two particular features. The first is that it focusses on the peaceful resolution of international *commercial* disputes, namely, in accordance with Article 1, it applies to agreements resulting from mediation and concluded in writing by the parties to resolve a commercial dispute (settlement agreement) which is international when it is signed.[67] At the same time, the Convention does not apply to settlement agreements (a) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (b) relating to family, inheritance or employment law; (c) that have been approved by a court or concluded in the course of proceedings before a court and are enforceable as a judgment in the state of that court; or (d) settlement agreements that have been recorded and are enforceable as an arbitral award.[68]

The second, main feature of the Convention is its enforcement mechanism. According to Article 4, each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Like the New York Convention, the Singapore Convention contains an exclusive list of grounds on which the competent authority of the state may refuse to recognise a settlement agreement: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement is null and void, inoperative or incapable of being performed, is not binding or is not final, according to its terms or has been subsequently modified; (c) the obligations in the settlement agreement have been performed or are not clear or comprehensible; (d) granting relief would be contrary to the terms of the settlement agreement; (e) there was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which that party would not have entered into the settlement agreement; (f) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence, and such failure to disclose had a material impact or undue influence on a party, without which that party would not have entered into the settlement agreement. The burden of proof rests with the person against whom the application

[65] *See Background to the Convention*, Singapore Convention on Mediation, 25 February 2025, available at: https://www.singaporeconvention.org/convention/about (accessed 30 June 2025).

[66] *See Jurisdictions*, Singapore Convention on Mediation, available at: https://www.singaporeconvention.org/jurisdictions (accessed 30 June 2025).

[67] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted December 2018), Art. 1(1).

[68] *Ibidem*, Art. 1(2–3).

is filed. The competent authority of the Party to the Convention where relief is sought under Art. 4 may also refuse to grant relief if it finds that (a) granting relief would be contrary to the public policy of that party or (b) the subject matter of the dispute is not capable of being settled by mediation under the law of that party.[69] These grounds are similar to those provided by the New York Convention for the enforcement of arbitration awards.

The Singapore Convention is called a milestone in international mediation, but at the same time commentators note that its success depends on two factors:

- international support for the Convention
- its domestic implementation through legislation and enforcement authorities.[70]

2.1.2.2. Application of the Singapore Convention to investor–state mediation

Considering that the Convention applies to international commercial disputes only, the question logically arises whether it can be applied to investor–state mediation. The answer is yes, but only to disputes which are commercial in nature.

The WG II consistently stated that the Singapore Convention is limited to "settlement agreements which are commercial in nature"[71] and "confirmed its understanding that the Convention would not have any impact or interfere with the public international law aspects of state liability or state immunity".[72] At the same time, the Convention is not limited to settlement agreements between only commercial parties, and does not automatically exclude being applied to state entities.[73] Art. 8(1) of the Convention states that a party to the Convention may declare that it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration. By this,

[69] *Ibidem*, Art. 4.

[70] N.Y. Morris-Sharma, *The Singapore Convention: A Milestone for Mediation*, 6(2) BCDR International Arbitration Review 261 (2019), p. 264.

[71] UNCITRAL, *Settlement of Commercial Disputes – International Commercial Conciliation: Enforceability of Settlement Agreements*, *Note by the Secretariat, Sixty-fourth Session (1–5 February 2016)*, A/CN.9/WG.II/WP.195, 2 December 2015, para. 14; M. Manukyan, *Singapore Convention Series: A Call for a Broad Interpretation of the Singapore Mediation Convention in the Context of Investor–State Disputes*, Kluwer Mediation Blog, 10 June 2019, available at: https://mediationblog.kluwerarbitration.com/2019/06/10/singapore-convention-series-a-call-for-a-broad-interpretation-of-the-singapore-mediation-convention-in-the-context-of-investor-state-disputes/ (accessed 30 June 2025).

[72] UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of its Sixty-fifth Session (Vienna, 12–23 September 2016), Fiftieth Session (3–21 July 2017)*, A/CN.9/896, 30 September 2016, para. 61.

[73] *Ibidem*.

the Convention is meant to be inclusionary and to facilitate enforcement even in investor–state disputes involving government entities.[74]

Interestingly, in one of its reports, the WG III – which works on reforming ISDS – stated that the Convention "contained reservations which would allow States to tailor its application in a flexible manner, including in the context of investor–state dispute settlement."[75] The WG III also included in the draft provisions on mediation a provision that the parties shall ensure that a settlement agreement resulting from mediation meets the requirements set forth in the Singapore Convention on Mediation. Accordingly, the WG III's view is that the Singapore Convention may apply to investment disputes.

It should be also noted that investor–state disputes typically arise on the basis of an investment treaty, free trade agreement, investment contract, investment legislation or by virtue of an umbrella clause in a treaty. In the absence of a reservation by the states in accordance with Art. 8 of the Singapore Convention, the commercial aspects of such disputes would certainly be covered under the Singapore Convention.[76]

2.1.3. Rules and guidelines on investor–state mediation

In recent years, several reputable arbitral institutions and non-governmental organisations have also promoted mediation, presenting their mediation rules and guidelines: the ICSID, the Vienna International Arbitration Centre (VIAC), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce Arbitration Institute (SCC), the International Bar Association (IBA), the Energy Charter Treaty Congress (ECT Congress) and the International Mediation Institute (IMI).

2.1.3.1. ICSID Mediation Rules 2022

In response to the criticism of ISDS, the ICSID launched the Rules Amendment Project in 2016, the goal of which was to modernise, simplify and streamline the rules. Responding to requests from member states and users of the ICSID arbitration and conciliation services, the ICSID proposed, among other things, the adoption of the first set of institutional mediation rules to resolve investment disputes. After consultation, the ICSID published six working papers, updating its administrative and financial regulations, institution rules, arbitration and con-

[74] R. Tan, *Investor-State Arbitration Meets Mediation: The Singapore Convention on Mediation as Game-Changer*, Kluwer Arbitration Blog, 29 September 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/09/29/investor-state-arbitration-meets-mediation-the-singapore-convention-on-mediation-as-game-changer/ (accessed 30 June 2025).

[75] UNCITRAL, *Summary of the Intersessional Regional Meeting on Investor–State Dispute Settlement (ISDS) Reform Submitted by the Government of the Dominican Republic, Thirty-seventh Session (1–5 April 2019)*, A/CN.9/WG.III/WP.160, 27 February 2019, para. 54.

[76] UNCITRAL, *supra* note 69.

ciliation rules and additional facility rules, in addition to establishing new rules for mediation and fact-finding.[77] ICSID member states approved the amended rules on 21 March 2022, and the updated rules went into effect on 1 July 2022. The ICSID Mediation Rules became the first institutional mediation rules designed *specifically* for investment disputes.[78] Their main provisions were described in section 1.2 – "How is investor–state mediation conducted?"

2.1.3.2. Other institutional rules for investor–state mediation

In 2021, the VIAC introduced the Rules of Investment Mediation, which complement the Vienna Investment Arbitration Rules and may be used either independently of, or in conjunction with, arbitration proceedings. It is largely based on the proven concept of the VIAC Arbitration and Mediation Rules for commercial disputes, supplemented by special features that are essential to investment proceedings.[79]

Some other arbitration institutions have introduced their own mediation rules as well. These are the ICC Mediation Rules 2014 and the SCC Mediation Rules 2023. Although they are not specifically designed for investor–state disputes, they could apply to them as well. However, the ICC has so far administered only one treaty-based mediation. The SCC has so far not administered any investor–state mediation.[80]

2.1.3.3. IBA Rules for investor–state mediation

The IBA Rules for Investor–State Mediation were adopted in 2012, being the first rules "designed for the mediation of investment-related differences or disputes involving States and State entities."[81] To cite one commentator, it was an "extremely important first step toward legitimizing investor–state mediation."[82] At the same time, it was noted that "the rules [were] unlikely to go far enough to motivate significant integration of mediation into the fabric of the investment treaty context."[83] This was true, and as we can see 13 years after their adoption, these rules alone have

[77] *See ICSID Rules and Regulations Amendment*, International Centre for Settlement of Investment Disputes, 1 July 2022, available at: https://icsid.worldbank.org/resources/rules-amendments (accessed 30 June 2025). *See also* M. Harutyunyan, *The Revised ICSID Rules: A Further Step Towards Transparency and Efficiency*, 40(3) ASA Bulletin 529 (2022).

[78] *Rules and Regulations – Mediation*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

[79] *Rules of Investment Arbitration and Mediation 2021*, Vienna International Arbitral Centre, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

[80] H. Verbist, *Mediation as a Method to Settle International Trade and Investment Disputes*, in: A.M. Anderson, B. Beaumont (eds.), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*, Wolters Kluwer, Alphen aan den Rijn: 2020, pp. 362–363.

[81] Art. 1(1) of the IBA Rules for Investor–State Mediation (2012).

[82] N.A. Welsh, A.K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harvard Negotiation Law Review 71 (2013), p. 83.

[83] *Ibidem*.

not been able to change the stance of investor–state mediation. However, they are still in place and offer clear mechanisms and provisions for parties to initiate mediation.

2.1.3.4. Guidelines on investor–state mediation

In 2016, the ECT Congress adopted its Guide on Investment Mediation. According to the preamble, it is designed to (a) explain the mediation process in general; (b) facilitate tips; and (c) explain the role of the Energy Charter Secretariat and other institutions. The aim is to have an explanatory document that could be voluntarily used by governments and companies to take the decision on whether to go for mediation and how to prepare for it. Some commentators have said that the adoption of this Guide is a clear recognition by states that mediation can play an important role in ISDS.[84]

One more guideline on investor–state mediation was issued in 2016. The IMI issued the Competency Criteria for Investor–State Mediators. The aim of the Criteria is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators or co-mediators for disagreements involving private-sector entities and states, by listing criteria that can help inform and guide their choices.[85] According to it, ideally, selected investor–state mediators should have satisfactory levels of knowledge and experience in each of the following areas: (a) investor–state issues; (b) mediation and other dispute resolution processes; (c) different forms of negotiation, mediation and conciliation; (d) arbitration and adjudication; (e) intercultural competency; and (f) other competencies such as knowledge of various tools and technologies that can assist the participants in communicating more effectively, reducing costs and saving time, such as online webinar or video-conferencing systems, data-analysis tools (e.g. decision trees or mind maps) and process management skills.[86]

2.2. Are these developments sufficient?

All these developments are of great importance for increasing the use of investor–state mediation in future. They are aimed at creating a clear international-law framework for conducting investor–state mediation, which simply did not exist a few years ago. These developments contributed to it in the following ways:

– The Singapore Convention has created an effective mechanism for enforcing international settlement agreements, which will definitely be taken into account by parties when choosing the most suitable dispute resolution mech-

[84] *Conference Endorses Guide on Investment Mediation*, International Energy Charter, 1 August 2016, available at: https://tinyurl.com/yptjyxn6 (accessed 30 June 2025).

[85] *IMI Competency Criteria for Investor–State Mediators*, International Mediation Institute, Hague: 2016, p. 1, available at: https://imimediation.org/wp-content/uploads/2022/03/IMI-Investor-State-Mediation-Competency-Criteria.pdf (accessed 30 June 2025).

[86] *Ibidem*, p. 4.

anism. Additionally, becoming a party to the Convention will demonstrate a state's recognition of mediation as a suitable dispute resolution mechanism and its willingness to comply with any outcome reached.[87]

- States may include the WG III's draft provisions on mediation in their investment agreements with other states or contracts with investors to make mediation an available option in the event of an investment dispute. The relevant provision will encourage the parties to consider mediation.[88]
- The existence of several sets of rules suitable for investor–state mediation gives the parties the opportunity to choose how they want to organise their procedure (for example, with the involvement of the institution or not). In addition, they provide the parties with a clear idea of how the procedure will take place. All the above-mentioned guidelines are also important as they are a useful source for the parties when choosing the most suitable dispute resolution mechanism and conducting the mediation proceedings.

However, it is also important to address existing concerns about investor–state mediation. Section 1.4 – "Concerns about investor–state mediation" identifies four main areas: (a) the confidentiality of mediation; (b) politics; (c) the lack of national-law frameworks; and (d) the lack of awareness. The current developments address only one of them: confidentiality.

The WG III addressed the issue of confidentiality by providing the default rule under draft provision 4 that all information related to mediation proceedings is confidential, with a few exceptions: (a) when the information or document is independently available; (b) when disclosure is required by law; (c) a party may disclose the fact that mediation is taking place or has taken place; and (d) a party may disclose the outcome of the mediation, including any settlement agreement.[89] The rules for investor–state mediation by the ICSID, the IBA and the VIAC also address the issue of confidentiality by providing a default rule with exceptions.

While the discussion on confidentiality is not over, all these developments contribute greatly to it. Considering that this has been proposed, in particular, by the WG III – whose decisions have been worked on by many exceptional experts and which has considered the submissions made by many states – such a proposal is very authoritative and will most likely be taken into account in future. Nonetheless, confidentiality is not the main issue which restrains investment from widespread

[87] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 46.

[88] *Ibidem*, para. 47.

[89] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation, Note by the Secretariat, Forty-third Session (5–16 September 2022)*, A/CN.9/WG.III/WP.218, 20 July 2022, pp. 6–7.

use. In the author's opinion, the next three concerns are much more important to be addressed in order to increase the use of investor–state mediation.

The first of them, the lack of awareness, is a complex issue which cannot be resolved in a few days. In the meantime, every conference, training workshop or even article on investor–state mediation may contribute to its popularisation to some extent. Given that this topic is widely discussed today, all of these developments contribute to a greater awareness of investor–state mediation between lawyers, investors and politicians. So, it is likely that the awareness of mediation among people who are involved in resolution of disputes between states and investors will increase in the coming years. The second issue is politics. It is difficult to predict or influence the behaviour of politicians, but it is more likely that after clear international- and national-law frameworks are developed, they will be more inclined to mediate disputes with investors. The third and most problematic issue, in the author's opinion, is the lack of national law frameworks for investor–state mediation. The challenge is that the international community has difficulties addressing it, as this is an internal matter for each state.

The development and adoption of a relevant legal framework in national law is a rather time-consuming process. Even such a significant international treaty as the Singapore Convention, after five years, had only been signed by 57 states and ratified by 15 states, which shows how slowly states may react to new developments in mediation. With national regulations it can be even more difficult and longer, because states have to develop them by themselves. Unfortunately, it may take years for states to create appropriate domestic legislation, if they even decide to do so. In addition, politicians may consider other issues to be more important (although some of them truly are), and therefore this will not be on their agenda.

CONCLUSION

As we can see from section 1, mediation is a promising method of dispute resolution that can take into account the interests of both parties, preserve their relationship and offer other strengths – such as flexibility, the ability to choose mediators (co-mediators), confidentiality, etc. However, it has not been widely used in ISDS, in spite of its great potential.

In the last decade, many steps have been taken to change this, the most important of which are the WG III reform, the Singapore Convention and the adoption of mediation rules and guidelines. All these developments are of great importance, because they are aimed at creating an international-law framework for investor–state mediation, which simply did not exist a few years ago. Nevertheless, they do not address one significant concern: the lack of national-law frameworks for inves-

tor–state mediation, including a clear framework for politicians on how to act in case of mediation. Therefore, it is necessary to continue the work on developing investor–state mediation, although now its main volume should be carried out not within the framework of international organisations, but in the legislative bodies of various states.

In order to ensure widespread use of investor–state mediation in future, states should not only implement those tools that the international community has developed in recent years, but should also develop their own domestic regulation on mediation. In particular, states should take the following steps:

- Modify their investment treaties to include mediation as a voluntary or mandatory dispute resolution mechanism. For this, they can use the draft provisions on investment mediation prepared by the WG III.
- Sign and ratify the Singapore Convention. Although the Convention can be used only for commercial issues in investor–state mediation, to cite one commentator, it will "give mediation enormous credibility as a dispute resolution mechanism that can be used as part of the dispute resolution toolkit".[90]
- Create a domestic legal framework for mediation, including for its officials, on how to act during investor–state mediation. As a first step, during one of the sessions of WG III, states were invited to adopt the UNCITRAL Law on Mediation.[91]

In summary, it should be noted that current developments have laid a solid foundation for the future of investor–state mediation. However, states and the international community still need to do a lot of work in order for mediation to stand beside negotiations and arbitration as a main method of resolving investment disputes.

[90] W. von Kumberg, *Investor State Mediation and the Singapore Convention*, ADR Institute of Canada, available at: https://adric.ca/investor-state-mediation-and-the-singapore-convention/ (accessed 30 June 2025).

[91] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 45.

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AN AXIOLOGICAL TURN IN EUROPEAN CONSTITUTIONALISM?[**]

Abstract: *Article 2 of the Treaty on European Union (TEU), stipulating that the Union was founded on the values common to its Member States (MSs), has led to a shift towards values in the drafting, application and interpretation of EU law. This can be seen as a significant paradigm shift in the discourse on European constitutional pluralism. It represents a transition, yet not a departure, from the "Union of law" to the "Union of values", from a Union that is neutral towards values to one that is value-friendly. This paradigm shift is especially symbolised and illustrated by the reference to values in the case law of the Court of Justice of the European Union (known as Wertejurisprudenz), the promotion of values in the EU's international relations and policies and the use of values to legitimise EU legislation and as a criterion for reviewing and assessing the MSs' activity, even in domains that are within their exclusive purview.*

A characteristic feature of the values listed in Art. 2 TEU, on which the strength and scope of their impact on the EU legal and institutional system directly depend, is the fact that they are legal values forming – as internal values – an integral part of the founding Treaties. Due to their placement within the Treaty structure, they are fundamental values, and because of the Treaty's role as a constitutional charter, they are also foundational values. The listing of these values in Art. 2 TEU has objectified them – their substance no longer depends on individual moral beliefs. They are legal norms that are legally binding on their addressees.

In the literature, Art. 2 TEU is often given the status and role of a homogeneity clause. However, with all due respect for this interpretative approach, I consider it inconsistent with both the meaning of this provision, which was intended to strengthen

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the Union's legitimacy, and with the premises of European constitutional pluralism, which safeguard and protect the pluralism of values while opposing their uniformity and hierarchisation. It seems, however, that turning values into homogenising clauses that would unify the quantitatively and qualitatively diverse MSs' constitutional value standards – with the CJEU monitoring their compliance with as-yet undetermined EU models – and deriving particular obligations for the MSs from these values in conjunction with other Treaty provisions is taking it too far.

Keywords: values of the European Union, general principles of EU law, European constitutional pluralism, rule of law, Court of Justice of the European Union, CJEU

INTRODUCTION

The recognition of and reference to values in constitutional discourse is not a new phenomenon. Certain values (a system of values) lie at the foundation of every state's legal order, including every constitution, as they justify that order and define the normative trajectory and framework of its development.[1] Values are taken into account in the legislative processes of drafting, applying and interpreting the law. Constitutional courts review statutory law for compliance with constitutional values. Constitutional rights and freedoms are interpreted not only in deontic terms, as subjective rights, but also in axiological terms, as values of the objective legal order.[2] Although some constitutional values are explicitly anchored in or derived from constitutional provisions (such as preambles), a characteristic feature of the constitutional discourse on values has been and continues to be the recognition of and reference to primarily undefined and uncodified extra-legal values, i.e. those that do not belong to a legal order, but rather to the axiological system.[3] These values are therefore external to a given legal system and have been incorporated into it only through various interpretative processes. In the European constitutional discourse, there was no broad reference to values or value systems and their significance for integration processes.[4] It was only once the Treaty of Lisbon incorporated values

[1] *See* Polish Constitutional Tribunal, judgment of the 30 September 2008, K 44/07: "we understand law not only as a set of provisions established in accordance with a formally defined procedure, but also as a system of norms that are axiologically and teleologically interrelated – a cultural construct rooted in the historical experience of the community and built upon a shared system of values specific to a given group of entities."

[2] U. di Fabio, *Grundrechte als Werteordnung*, 1 Juristen Zeitung 1 (2004).

[3] *See* L. Leszczyński, *Kryteria pozaprawne w sądowej wykładni prawa* [Extralegal Criteria in Judicial Interpretation of Law], Wolters Kluwer, Warsaw: 2022, p. 1.

[4] For more on the history of the discourse on fundamental values in the process of European integration, *see* M. Avbelj, *Values, Constitutionalism and the Viability of European Integration*, in: M. Avbelj (ed.), *The Future of EU Constitutionalism*, Hart Publishing, Oxford: 2023, pp. 37–42.

into Treaty law that participants in this discourse were compelled – as it were – to address in a more extensive and methodologically responsible way issues such as the normative nature, status, validity and application of values and their role within the EU legal and constitutional order, particularly as regards reviewing the law's conformity with these values, and so on. Changes in the approach to EU values in European constitutionalism are so significant and fundamental that the term "axiological turn" is justified in this context.[5] By the axiological turn in EU constitutionalism, I generally mean a shift to values in the constitutional discourse.[6]

Below, I explain the concept of "shift to values" and highlight its relation to the idea of a paradigm shift in EU constitutionalism from a legalist to an axiological approach (section 1). In particular, I describe the consequences of incorporating values into EU primary law and expanding the scope of the Court of Justice's axiological interpretation to include the values explicitly set out in the founding Treaties. Accordingly, I limit the subject and scope of my discussion to internal legal values, specifically those listed in the first sentence of Art. 2 of the Treaty on European Union (TEU). However, I do not address the significance or ways of invoking within the European constitutional discourse external extra-legal values or other legal norms recognised as values in judicial rulings.

In the following section (section 2), I discuss the legal nature of the values in question. I also posit that the values listed in Art. 2 TEU are legal values: they are binding, normative (i.e. they constitute norms) and legally enforceable. Consequently, I do not adopt the view that values belong solely to the axiological realm, while principles of law and legal rules belong to the legal order, even though this claim holds true for external values, which are taken into account in the process of interpreting and justifying the law.

Next, I argue that the classic dualism of norms-as-principles and norms-as-rules is complemented by values, but only by internal legal values, i.e. those explicitly set out in binding legislation and designated as values, as in the case of the first sentence of Art. 2 TEU. Therefore, based on this premise, it is necessary to examine the relations between norms-as-values and norms-as-principles. However, before discussing the legal nature of values, I first make certain preliminary assumptions

[5] According to T.T. Koncewicz, "this loosely worded and full of conceptual ambiguity [sic] provision [Art. 2 TEU] marks a veritable Copernican moment in the history of EU law" – entry for *Values*, in: *Oxford Encyclopedia for EU Law*, available at: http://opil.ouplaw.com (accessed 30 June 2025).

[6] For a new legal paradigm that initiates an axiological evolution compared with previous provisions of the Treaties, *see* C.J. Moreiro González, *Implementing the Rule of Law in the European Union: How Long Trapped in Penelope's Spinning Wheel from Article 2 of the TEU?*, 25 Cambridge Yearbook of European Legal Studies 161 (2023); for the axiological turn in the Polish constitutional discourse, *see* K.J. Kaleta, *Rola i znaczenie wartości we współczesnym dyskursie konstytucyjnym* [Role and Significance of Values in Contemporary Constitutional Discourse], in: M. Dudek, M. Stępień (eds.), *Aksjologiczny wymiar prawa* [Axiological Aspect of Law], Nomos, Cracow: 2015, p. 122.

about values, convinced that the Treaty-based "positivisation" of values – through their reception from the constitutional orders of the Member States (MSs) – has not fundamentally altered their structure or role. When explaining the place and significance of values in EU constitutionalism, I use some simplification, drawn from value theory, which is necessarily arbitrary but essential for ensuring the clarity of the following discussion. In short, I assume that the values listed in the first sentence of Art. 2 TEU are intrinsic and hence non-instrumental, as well as objective rather than subjective. I believe that for defining the legal nature and significance of the values for EU constitutionalism, it is crucial to explain two statements in Art. 2 TEU: "The European Union is founded on the values" and "[t]hese values are common to the Member States". I interpret the first phrase to mean that these values are fundamental values of the EU as an international organisation. The other phrase suggests that the values of the MSs inspired the Treaty framers to establish an exhaustive list of EU values. I devote some attention to the binding nature of these values, and also to the entities responsible for implementing, promoting and adhering to them. Additionally, I examine the legitimacy of the Court of Justice of the European Union (CJEU) in overseeing the MSs' compliance with EU values.

Following that, I address the contentious issue of value pluralism (section 3), which is primarily an ethical and moral question, yet can serve as a useful tool for clarifying the relations among the legal values listed in Art. 2 TEU, particularly for arguing that these relations are non-hierarchical. However, this does not preclude the possibility that they can form a structured system based on substantive criteria.

The fact that legal values can fulfil a non-instrumental role in European constitutionalism largely depends on their analytical structure. My analysis of the legal nature of values is based on the premise that the classic dualism of legal norms, i.e. the distinction between norms-as-principles and norms-as-rules, is modified and supplemented by norms-as-values. Since both the legal scholarship and case law generally agree that norms-as-values do not share the characteristics of norms-as-rules and that, in terms of their structure and function, they are closely related to or even constitute norms-as-principles, I find it necessary and justified to indicate the similarities and differences between legal values and principles of law (section 4).

I then attempt to define the role of the legal values listed in the first sentence of Art. 2 TEU in shaping both the substance and form of European constitutionalism. I go beyond their commonly recognised role of justifying and legitimising the EU's constitutional legal order and institutional system, which is widely and rightly considered the main purpose of the core constitutional values (section 5).

The concept of constitutionalism in general, and in particular of European constitutionalism, is highly controversial. For the purposes of this study, I adopt the definition proposed by Alec Stone Sweet:

> In contrast to defining "constitution," it may be impossible to define the concept of "constitutionalism" in a relatively consensual, straightforward way. My preferred definition of constitutionalism denotes the commitment on the part of any given political community to be governed by constitutional rules and principles. Thus, constitutionalism is a variable. The commitment to live under a constitution, rather than to seek to undermine or destroy it, varies. In any context, this commitment, as an indicator of a constitution's social legitimacy, can be strong or weak and its character can change over time.[7]

Elsewhere, he argues: "I prefer to conceptualize constitutionalism as the commitment of a polity to govern itself in conformity with the meta-norms."[8] He also adds that "[c]onstitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules."[9]

1. AXIOLOGICAL TURN AS A PARADIGM SHIFT

The concept of an axiological turn is broader than that of an ethical turn, which is understood as a shift to moral values. The turn discussed herein, however, refers specifically to a shift towards legal values, where the focus is not on moral values but – as indicated in the list in the first sentence of Art. 2 TEU – on other values, political ones in particular. The shift towards values in the EU was not triggered by a single event, such as the normative change introduced by Art. 2 TEU. Rather, it has been part of an ongoing fundamental transformation of the European legal culture – one that acknowledges and emphasises the role of values in the European legal, political and socioeconomic integration.[10] This is particularly evident in the legitimising, integrative and federalising role that values play in the rulemaking, application and interpretation of EU law, as well as in certain areas of EU policymaking and international relations. This axiological turn is exemplified by changes in the societal perception of the rule of law as a value that is crucial to the development and protection of the European integration, and that legitimises the actions of the

[7] A. Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16(2) Indiana Journal of Global Legal Studies 621 (2009), p. 626.

[8] *Ibidem*.

[9] *Ibidem*, p. 628.

[10] The process of values crystallising as important elements of the EU structure and legal system accelerated significantly during the constitutional crisis in Poland, when Polish courts sought protection in the CJEU against unconstitutional actions of the legislative and executive powers limiting the independence of courts and the impartiality of judges (*see e.g.* L. Pech, P. Wachowiec, D. Mazur, *Poland's Rule of Law Breakdown: A Five-year Assessment of EU's (In)action*, 13(1) Hague Journal on the Rule of Law 1 (2021)).

EU and its MSs to restore the rule of law[11] where it has been undermined or is at serious risk.[12] The EU not only refers to the rule of law in these actions, but also invokes other values enshrined in Art. 2 TEU, particularly respect for human rights and democracy.

It is crucial to emphasise that the shift to values, as discussed more broadly below, refers specifically to a shift towards legal values, i.e. values explicitly listed in the Treaties and designated as such, as in the first sentence of Art. 2 TEU (specified internal legal values). The values enumerated there are core constitutional values, comprising respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of members of minority groups. Another category of values referenced in European constitutionalism is secondary constitutional values, i.e. internal legal values which are not indicated as values. These are mentioned in the second sentence of Art. 2 TEU and include pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Finally, the third group comprises other values which can be decoded based on the EU legal system or which derive from the constitutional traditions of the MSs, forming part of the common EU values shared by the MSs.

In this context, I understand the "shift towards values" as a partial, progressive paradigm shift in European constitutionalism from a fundamentally legalist approach to a partially axiological one. I interpret the term "paradigm" in a Kuhnian sense, as "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners."[13] More broadly, it has various components: "(i) 'symbolical generalizations', (ii) beliefs or 'metaphysical paradigms', (iii) values, and (iv) 'exemplars', that is, concrete problem solutions applied and thereby shared by the entire community."[14] Regarding this understanding of the paradigm, it is assumed that the legal dogmatic paradigm has four components: "(1) philosophical background assumptions, (2) assumptions concerning the sources of law, (3) methodological rules and principles, and (4) values

[11] The EU executive authorities unlocked EUR 137 billion for Poland from recovery and cohesion policy funds, which had been frozen due to concerns about the rule of law (*see* A. Krzysztoszek, *European Commission to Release Frozen €137bn for Poland*, Euractiv, 23 February 2024, https://tinyurl.com/2m9p5zjh (accessed 30 June 2025)).

[12] On the social perception of the principle of the rule of law, *see e.g.* J. Gutmann, J. Kantorowicz, S. Voigt, *How Do Citizens Define and Value the Rule of Law? A Conjoint Experiment in Germany and Poland*, 32(4) Journal of European Public Policy 899 (2025).

[13] T.S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago: 1970, p. VIII.

[14] T.S. Kuhn, *Postscript-1969*, in: T.S. Kuhn (ed.), *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago: 1970, pp. 182–187, cited by B. Fekete, *Paradigms in Modern European Comparative Law*, Bloomsbury Publishing, Dublin: 2021, p. 25.

common to the dogmaticians within the legal system."[15] Therefore, the shift of the legal paradigm refers respectively to: "(1) cultural change on a large scale. It implies the reorientation of a society towards changing fundamental norms and values, including economic and legal organization. This is a macrosociological event on a timescale; (2) change of perspective on legal theoretical questions. Such changes relate mainly to the epistemological aspects of the legal paradigm that transcends the individual human lifetime; (3) change of dogmatic methodology."[16]

The pragmatic shift towards values in EU law consists, firstly, in incorporating both specified and unspecified values into Treaty provisions, particularly Art. 2 TEU (the normative turn). Secondly, it involves considerable and relatively wide recognition of and reference to the values under Art. 2 TEU when EU law is interpreted and applied by the CJEU (the judicative turn).[17] Thirdly, it is seen in the fact that these values are invoked and taken into account in lawmaking procedures while adopting EU secondary law (the legislative turn). Fourthly, EU values are respected and promoted in the Union's international activity as well as in strictly political activities undertaken by EU bodies and institutions (value-based policies). Fifthly, this shift entails the EU protecting the values on which it is founded (Art. 2 TEU) through the (ineffective) non-exclusive[18] political mechanism provided for in Art. 7 TEU,[19] as well as through the principles and criteria governing the accession of new states to the EU. Sixthly, it involves the Union's protection and enforcement of the MSs' compliance with the values enshrined in Art. 2 TEU through EU judicial procedures, as provided for in Arts 267 and 258 Treaty on the functioning of the European Union (TFEU).[20] Finally, it consists in the so-called Rule of Law Conditionality Regulation and other relevant measures (such as the Rule of Law Framework).[21]

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[15] J.M. Broekman, *Changes of Paradigm in the Law*, in: A. Peczenik, L. Lindahl, B.V. Roermund (eds.), *Theory of Legal Science*, Springer, Dordrecht: 1984, p. 138.

[16] *Ibidem*, pp. 138–139.

[17] *See* D.L. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks*, Oxford University Press, Oxford: 2023; *see also* M. Potacs, *Wertkonforme Auslegung des Unionsrechts?*, 51 Europarecht 164 (2016), pp. 164–175.

[18] *See* Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98, para. 195: "in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State."

[19] *E.g.* D. Kochenov, *Busting the Myths Nuclear: A Commentary on Article 7 TEU*, European University Institute, San Domenico di Fiesole: 2017; J. Bauerschmidt, *Rechtsstaatlichkeit in der EU und die Instrumente zu ihrer Verteidigung: Artikel 7 EUV, Rechtsstaatlichkeitsbericht und -dialog, Haushaltskonditionalität*, 59(3) EuR 300 (2024), pp. 311–315.

[20] *E.g.* Case C-791/19 *European Commission v. Republic of Poland*, EU:C:2021:596; Case C-204/21 *European Commission v. Republic of Poland*, EU:C:2023:442.

[21] *See Rule of Law Framework*, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en#process (accessed 30 June 2025).

The shift towards values means that the traditionally legalistic approach to critical discourse about EU constitutional pluralism[22] is modified and supplemented by an axiological perspective. The dualistic, binary legal dogmatic framework defining what is lawful/unlawful or compliant/non-compliant with the law is being complemented, and in some cases even partially modified, by the good/bad and friendly/hostile dualism.[23] As a result of the cumulative application of axiological and non-axiological assessment criteria, any action by the EU or an MS may be considered not only potentially unlawful (a breach of EU law), but also "bad" or "hostile" to EU values.

As a result, there is a shift in constitutional discourse driven by a change in the philosophical stance of its participants from positivist to axiological. This shift involves recognising fundamental, intrinsic and objective values as sources of EU constitutional law; acknowledging the respect for and reference to values as a necessary element of the prevailing legal methodology; affirming that the EU's fundamental, intrinsic and objective values are shared by the entities that formulate, apply and interpret EU law; and, finally, recognising constitutional values as an essential and constitutive element of both the EU's identity and the constitutional identity of its individual MSs.

The normative turn involving values in the EU dates back to 2009, i.e. the Treaty of Lisbon's entry into force. This Treaty introduced Art. 1a into the TEU, which states that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Additionally, the Treaty of Lisbon revised the former Art. 6(1) TEU, which read: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." This change is not merely linguistic, i.e. simply replacing the word "principles" with "values" in the Treaty provision that defines the foundations of the EU. Rather, the Treaty provisions explicitly reference the values listed in the first sentence of Art. 2 TEU – as seen in Arts. 7 and 49 TEU – or refer more

[22] *See* K. Jaklic, *Constitutional Pluralism in the EU*, Oxford University Press, Oxford: 2013; M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford: 2012.

[23] *See e.g.* J. Zajadło, *Wykładnia wroga wobec konstytucji* [Interpretation Hostile to the Constitution], 1 Przegląd Konstytucyjny 26 (2018); on the friendly and critical approach of the BVerfG to European integration, *see* T. Giegerich, *Zwischen Europafreundlichkeit und Europaskepsis Kritischer Überblick über die bundesverfassungsgerichtliche Rechtsprechung zur europäischen Integration*, 19 Zeitschrift für Europarechtliche Studie 3 (2016); K. Kos, *Theories and Limitations of EU-Friendly Interpretation of the Polish Constitution*, 12(1) Polish Review of International and European Law 47 (2023), pp. 48–56.

generally to values, as in the Preamble and other Treaty provisions.[24] The values constitute an integral part of the substance of the provision in question, and their weight, significance and role within EU constitutionalism depend not only on their substantive content, but also largely on whether the provision is programmatic, task-orientated, competence-based, legally substantive, procedural or sanctioning in nature. Moreover, Art. 2 TEU, due to its placement under Title I: Common Provisions, has an effect on other Treaty provisions that do not explicitly mention values or refer to them in some way. Therefore, the values enshrined in Art. 2 TEU – as constitutional values – affect the interpretation and application of EU primary law, thereby contributing to the ongoing constitutionalisation of European integration. The CJEU plays a proactive role in this process. Its judicial activism is reflected in its approach to Art. 2 TEU, i.e. treating the fundamental values it enumerates not only as interpretative guidelines for EU law, but also as a legal basis for judicial decisions. The fundamental constitutional values are primarily incorporated into EU judicial procedures through the CJEU regarding the Treaty provisions as a sort of "concrete expression" of fundamental values. As a result, Art. 2 TEU – and the values it enshrines – becomes a criterion in the judicial assessment of laws, particularly those of the MSs.[25]

The term "value" appears in the Preamble to the Charter of Fundamental Rights of the European Union. However, the practical significance of Preamble is not particularly substantial. When applying and interpreting the provisions of the Charter, the CJEU does not directly refer to the relevant passages of the Preamble. Instead, it relies on the values enshrined in Art. 2 TEU, creating an intrinsic link between the essence of a fundamental right protected by the Charter and one of the values listed in Art. 2 TEU.[26] Among the regulations of EU secondary law that refer to values, Regulation 2020/2092 of the European Parliament and of the Council of

[24] For internal and external systemic context for Art. 2, *see* A. Wróbel, *Art. 2*, in: R. Grzeszczak, D. Kornobis-Romanowska (eds.), *Traktat o Unii Europejskiej. Komentarz* [Treaty on European Union: A Commentary], Wolters Kluwer, Warsaw: 2023, pp. 70–75.

[25] Judgments of the Court of Justice are emblematic for this approach in cases of a "rule of law crisis", in which the CJEU uses the idea of concrete expression – *see e.g.* Case C-430/21 *RS (Effect of the decisions of a constitutional court)*, EU:C:2022:99, para. 39: Art. 19(2) TEU, "which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice"; *see* Spieker, *supra* note 17, p. 264.

[26] M. Wendel, *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, 15(1) European Constitutional Law Review 17 (2019), pp. 27–29; *see* Case C-216/18 PPU *Minister for Justice and Equality v. LM (Deficiencies in the system of justice)*, EU:C:2018:586, para. 48: "the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded."

16 December 2020 on a general regime of conditionality for the protection of the Union budget is particularly significant. It not only references the values mentioned in Art. 2 TEU, but also provides a legal definition of one of these values, namely the rule of law (Art. 2(a)). Furthermore, it specifies actions or conditions that may indicate an MS's breach of the "principles" of the rule of law.[27]

The shift towards values in the CJEU case law[28] is the result of the Court's activist interpretation[29] of Art. 2 TEU, which not only emphasises these values as fundamental values within the EU legal order and substantively links them to the general principles of EU law and the Treaty provisions, but also operationalises them by treating them as a basis for judicial decisions, a criterion for the judicial review of laws and a guideline for the interpretation of EU law. A key ruling exemplifying this shift towards values is the CJEU judgment in the case *Associação Sindical dos Juízes Portugueses (ASJP)*, in which the Court stated that

> [a]ccording to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails." The Court further noted that "mutual trust between the Member States, and in particular between their courts and tribunals, is based on the fundamental premise that the Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.[30]

This judgment transformed the value of "the rule of law" into a legally actionable and enforceable standard, making it a reference point for the structure and functioning of the judiciary in the MSs.[31] In its judgment in *Minister for Justice and Equality v. LM (Deficiencies in the system of justice)*, the CJEU clarified its stance, stating that the said premise "implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected."[32] This case law is interpreted

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[27] I. Staudinger, *The Rise and Fall of Rule of Law Conditionality*, 7(2) European Papers 721 (2022).

[28] *See* Spieker, ***supra*** note 17.

[29] Activist interpretation is a manifestation of the judicial activism; M. Dawson, B. De Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, Cheltenham: 2013; K. Malleson, *The New Judiciary: The Effects of Expansion and Activism*, Routledge, London: 1999.

[30] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117, para. 30; M. Bonelli, M. Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16 Associação Sindical dos Juízes Portugueses*, 14(3) European Constitutional Law Review 622 (2018); L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Stockholm: 2021.

[31] F. Schorkopf, *Der Wertekonstitutionalismus der Europäischen Union*, 10 Juristen Zeitung 477 (2020), p. 481.

[32] Case C-216/18 PPU *Minister for Justice and Equality v. LM*, EU:C:2018:586, para. 35.

in legal doctrine as operationalisation of the values of Art. 2 TEU, which thus can be directly applied by EU and national courts in connection with other Treaty provisions (e.g. Art. 2 in conjunction with Art. 19(1) TEU).[33]

A characteristic feature of this line of case law is the practical application of Art. 2 TEU by the CJEU as a criterion for the review (assessment) of the MSs' actions, even in areas that come within their exclusive purview. This is in contrast to what one might infer from the wording of Art. 2 TEU, which provides for the "values on which the Union is founded" as a criterion for the review/assessment of actions of EU institutions and bodies,[34] which are required to "implement" these values through appropriate legal measures and instruments, as well as political actions. The Court's involvement in protecting these values from infringements by the MSs is justified by the ineffectiveness of the political review and sanctioning mechanism laid down in Art. 7 TEU and the lack of political will within the EU institutions[35] to take the necessary measures, among other reasons. Nevertheless, the CJEU is competent to review (assess) the compliance of the MSs' actions with the values on which the Union is founded, based on the general mandate under the first subparagraph of Art. 19(1) TEU, according to which the Court shall ensure that the law is observed in the interpretation and application of the Treaties. The phrase "ensure that the law is observed" implies that the Court's tasks of interpreting the Treaty provisions, rationally applying these provisions and ensuring their uniform enforcement were conceived by the Treaty framers as a primary task of constitutional significance.[36] The phrase is also general enough, which means that, firstly, the EU body authorised to define "law" in the meaning of this provision is the CJEU, which in turn means that the concept of "law" is open-ended, allowing the Court to consider or refer to non-Treaty sources of law as well. Secondly, in fulfilling the task outlined in the first subparagraph of Art. 19(1) TEU, the Court is empowered to define the nature and meaning of Treaty law,[37] for example, by emphasising its constitutional significance and role in achieving the goals of the European integra-

[33] *See* L.D. Spieker, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, 20 German Law Journal 1182 (2019), pp. 1204–1206; A. von Bogdandy, L.D. Spieker, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, 15(3) European Constitutional Law Review 391 (2019).

[34] *See* Cases C-542/18 RX-II and C-543/18 RX-ITS *Simpson v. Council of the European Union* (T646/16 P) and *HG v. European Commission* (T693/16 P), EU:C:2020:232, para. 71.

[35] K.L. Scheppele, D.V. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39(1) Yearbook of European Law 3 (2020).

[36] *Cf.* S. O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes*, Hart Publishing, Oxford: 2002, pp. 75–76.

[37] L. Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice*, Springer, Dordrecht: 2011, p. 14.

tion process,[38] which include ensuring the autonomy and uniformity of EU law.[39] In light of the above, there is no doubt that it was also the Court's responsibility to make it clear whether the values on which the Union is founded constitute law within the meaning of the first subparagraph of Art. 19(1) TEU. It is no coincidence that legal writings attribute to the Court the status of guardian of common values (*Hüter gemeinsamer Werte*),[40] which additionally legitimises and strengthens its political position as the main driver of constitutionalisation and federalisation of the EU legal order.[41] The shift towards values in the CJEU case law is noticeable in legal writings and commentary, which define this judicative trend as "value-based adjudication" (*Wertejurisprudenz*).[42]

A significant step in the development of the doctrine of fundamental values is the CJEU's judgment in *Repubblika*, in which the Court supplemented the value of the rule of law with a new element: the principle of non-regression. According to this principle,

> A Member State cannot [...] amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.[43]

In general, Art. 2 TEU, in conjunction with other Treaty provisions, prevents changes in the legal systems of the MSs that would result in the lowering (or dete-

[38] As stated by the CJEU in its judgment in *Les Verts*, "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty" (Case C-294/83 *Parti écologiste „Les Verts" v. European Parliament*, EU:C:1986:166, para. 23).

[39] Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, paras. 174 and 176.

[40] S.-P. Hwang, *Judikativer Werteschutz in der Europäischen Union: Eine verfassungsvergleichende Perspektive*, 3 Europarecht 240 (2024), p. 240.

[41] M. Nettesheim warns that "Gerichtshof der EU gegenwärtig eine konstitutionelle Transformation vorantreibt, die das Potential hat, die Demokratizität des im Verbund von EU und EU-Mitgliedstaaten angelegten Regierungssystems zu beschädigen" (M. Nettesheim, *Die föderale Homogenitätsklausel des Art. 2 EUV*, 3 Europarecht 269 (2024), p. 273). *See also* D.V. Kochenov, *Dialogical Rule of Law in the Hands of the Court of Justice: Analysis and Critique*, Central European University, Wien: 2023.

[42] F.C. Mayer, *Judikativer Werteschutz in der Europäischen Union: Grundlagen und Chancen*, 3 Europarecht 219 (2024).

[43] Case C-896/19 *Repubblika v. Il-Prim Ministru*, EU:C:2021:311, paras. 62 and 63; O. Mader, *Wege aus der Rechtsstaatsmisere: Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung*, 21 Europäische Zeitschrift für Wirtschaftsrecht 917 (2021), pp. 917–922; J. Scholtes, *Constitutionalising the End of History? Pitfalls of a Non-regression Principle for Article 2 TEU*, 19(1) European Constitutional Law Review 59 (2023).

rioration) of the standards of the values referred to in this provision, which allowed the MS to join the Union.

Alongside the normative and judicative turn, one can note a shift towards values in EU policies, particularly in the Union's external relations (Art. 8(1) TEU – area of prosperity and good-neighbourliness; and Arts. 3(5) and 21(2)(a) TEU – international relations of the Union).[44] As a result, the shift towards values in the EU is all-encompassing, affecting essentially all areas within the Treaty competencies of the Union, and is a core element of the majority of EU goals and tasks.

In a broader perspective, the shift towards values involves the Treaty framers' shifting, yet not departing, from the concept of a Union based on the principles of law (*Rechtsgemeinschaft/Rechtsunion*) to an endorsement of a Union based on values (*Wertegemeinschaft/Werteunion*).[45] In pragmatic terms, this means establishing and developing the EU's constitutional legal and institutional system based on the values listed in Art. 2 TEU. From a subjective perspective, this is tantamount to the EU legislative and interpretive authorities fully identifying with these legal values.

2. EU LEGAL VALUES AS FUNDAMENTAL CONSTITUTIONAL VALUES COMMON TO THE MEMBER STATES

As mentioned above, the values listed in the first sentence of Art. 2 TEU are legal values, that is, values explicitly set out in the Treaty provision and indicated as such. In contrast to extralegal values, which belong to the extralegal axiological system, EU legal values are part of the binding European law. The extralegal values can become legal values by being normatively transcribed into the legal order, either through the adoption of relevant provisions, the appropriate interpretation of existing provisions or the application and interpretation of provisions that refer to values. Therefore, although these are not non-legal values, their juridical characteristics should refer to the status, meaning and functions that are assigned to non-legal values within value theory. In this regard, formal classifications of values within this theory can be helpful, including the breakdown of values into objective and subjective, intrinsic and extrinsic, internal and external, and fundamental and instrumental values. As

[44] On the EU promoting values in international relations, *see e.g.* E. Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, 13(11) German Law Journal 1225 (2012).

[45] D. Blumenwitz, G.H. Gornig, D. Murswiek (eds.), *Die Europäische Union als Wertegemeinschaft*, Duncker & Humblot, Berlin: 2005; M. Niedobitek, K.-P. Sommermann (eds.), *Die Europäische Union als Wertegemeinschaft. Forschungssymposium zu Ehren von Siegfried Magiera*, Duncker & Humblot, Berlin: 2013.

these issues are highly controversial, having made some simplifying assumptions, I posit that EU legal values are internal, fundamental, objective and intrinsic values.

The legal values listed in Art. 2 TEU are internal values because they are part of the Treaty, which serves as the constitutional charter of the Union; they are not, obviously, external values, i.e. extralegal criteria for reviewing EU law. Internal values not only provide the axiological justification for the legal norms being established, but can also be used when assessing the application and interpretation of the law. As Jerzy Wróblewski pointed out, these assessments can be systemically or instrumentally relativised. In the former case, they are assessed according to the internal values specified in the legal norms being applied, where the assessment is about determining whether and to what extent the application of the law is consistent with these values. In the latter case, the assessment concerns whether and to what extent the decisions regarding the application of the law are appropriate means for achieving these internal values.[46] In cases where such a decision is not determined by legal norms, the authority applying such a law is given some discretion to choose among different decisions that either prescribe, prohibit or permit particular behaviour, preferring certain actions to others. The basis of such preference, however, is an assessment (*Beurteilung*) of the chosen alternative as the better one, and thus a certain rating (*Wertung*).[47] In this case, the authority applying the law is bound by internal legal values, which serve as the criterion for choosing a better solution among possible alternatives.[48] However, unlike rules that determine the choice, values do not determine but (only) influence it.[49] The enactment of EU secondary legislation and its implementation into the legal systems of the MSs can also be assessed from the perspective of internal legal values.[50]

The legal values listed in Art. 2 TEU are intrinsic values. Intrinsic value is generally understood as what "is valuable for its own sake, in itself, on its own, in its own right, as an end, or as such". The opposite is extrinsic value, which is typically characterised as "what is valuable as a means, or for something else's sake."[51] Accord-

[46] J. Wróblewski, *Wartości a decyzja sądowa* [Values Versus Judicial Decision], Ossolineum, Wrocław: 1973, p. 48; A. Von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16(2) European Law Journal 95 (2010).

[47] R. Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Suhrkamp, Frankfurt am Main: 1983, p. 29.

[48] From a pragmatic point of view, the authority applying EU law does not need to seek values outside the law or derive them from a given legal system, as these values are provided, "visible" and binding by virtue of their inclusion in Art. 2 TEU.

[49] *Cf.* T. Kuhn, *Objectivity, Value Judgment, and Theory Choice*, in: *The Essential Tension: Selected Studies in Scientific Tradition and Change*, The University of Chicago Press, Chicago: 1977, p. 320.

[50] On the axiology of lawmaking from the perspective of the theory of rational lawmaking, *see* J. Wróblewski, *Teoria racjonalnego tworzenia prawa* [Theory of Rational Lawmaking], Ossolineum, Wrocław: 1985, ch. 12.

[51] T. Rønnow-Rasmussen, *Intrinsic and Extrinsic Value*, in: I. Hirose, J. Olson (eds.), *The Oxford Handbook of Value Theory*, Oxford University Press, New York: 2015, p. 29.

ing to this approach, something is intrinsically valuable if and only if it is valuable in itself or as an end. A value is considered intrinsic if and only if it serves as justification for other values, while not being justified by any other value.[52] However, this does not mean that intrinsic values cannot derive from other values. As Toni Rasmussen points out, it is quite possible for a derivative valuable object to derive its value from that of its constituent elements.[53] This is the case with the intrinsic value of the rule of law, which is not justified by any other legal or extralegal value, but derives its value from the sum of the values of its constituent elements, such as legitimacy and judicial independence.[54]

The legal values enumerated in Art. 2 TEU are fundamental values. Referring to Kant's claims, they are values seen as ends in themselves, which means they are non-relativised, as opposed to instrumental values that are assessed as a means to an end.[55] Fundamental values do not require justification. The obligation to act in accordance with these core values arises from their analytical structure as legal values. The processes of legislating, applying, interpreting and implementing EU law can be assessed instrumentally as means to achieve these fundamental legal values, particularly by deciding whether these means help accomplish the goals embedded within those values.

The values specified in the first sentence of Art. 2 TEU are referred to as fundamental values or foundational values.[56] The wording of the provision ("The Union is founded on the values") indicates that it refers to foundational values, i.e. those that constitute the (axiological) foundation and characterise the Union's constitutionalism.[57]

I posit that the fundamental legal values in question are, in terms of value theory, objective values, i.e. independent of the emotional state of the person making the assessment. Even if one accepts that moral attitudes of some dominant social groups at a given time play a role in developing the values and defining their substance, the fact that those values were incorporated into the founding Treaties objectified them as fundamental legal values, protected by the EU legal system. Unlike sub-

[52] *Ibidem*, p. 32.

[53] *Ibidem*, p. 37.

[54] *See* Spieker, *supra* note 17, p. 163–164.

[55] Wróblewski, *supra* note 46, p. 52.

[56] J. Přibáň, *Constitutional Values as the Normalisation of Societal Power: From a Moral Transvaluation to a Systemic Self-Valuation*, 11 Hague Journal on the Rule of Law 451 (2019), p. 454; D. Pellegrini, *I controlimiti al primato del diritto dell'Unione europea nel dialogo tra le Corti*, Firenze University Press, Firenze: 2021, p. 152: "valori 'fondanti' realtà giuridica sovranazionale".

[57] *See* G. Nolte, *European and U.S. Constitutionalism: Comparing Essential Elements*, in: G. Nolte (ed.), *European and U.S. Constitutionalism*, Cambridge University Press, New York: 2005, p. 4: "Constitutionalism is about the fundamental rules and the identity, or better: the self-understanding (*Selbstverständnis*) of any particular political community."

jective values,[58] they are not susceptible to charges of arbitrariness, manipulation of preferences or elitism.

The key to explaining the legal nature, role and significance of values in EU constitutionalism is the phrase "the Union is founded on the values". This statement – understood as a descriptive rule, i.e. one that establishes an empirical regularity or generalisation[59] – boils down to affirming the existence of a real state of affairs, namely that the Union is based on these values. According to this concept of the descriptive rule, it is used to describe the world, and not to exert pressure on it. Descriptive rules do not mandate, prohibit or allow particular behaviour. The descriptive rule of "the Union is founded on the values" is not normative in nature, but it is empirically verifiable.

The statement "the Union is founded on the values" is not a descriptive statement with purely descriptive meaning, but rather an evaluative statement with normative meaning. The assertion that "the Union is founded on the values", as an evaluative statement, means that "the Union is valuable"; as a normative statement, it also commands, prohibits or permits particular behaviour of its addressees. The behaviour required by the norm "the Union is founded on the values" includes respect for/adherence to the values on which the Union is founded, their implementation into EU law and their protection;[60] the minimum obligation is to not lower the existing standard of the values. The requirement to respect, implement and protect the values listed in Art. 2 TEU refers both to the values integrated into a coherent axiological domain and to individual values, such as the rule of law. The statement "the Union is founded on the values", where value means a fundamental, non-instrumental value, can be understood in a broader sense as an obligation of EU bodies and institutions to achieve the goals covered by the values listed therein.

The normative, descriptive and evaluative approach to the content of Art. 2 TEU is also relevant for the meaning of the phrase "values common to the Member States." The expression "values common to the Member States" in a descriptive sense refers to a verifiable empirical reality: that the values listed in Art. 2 TEU are part of the legal orders of all the MSs and are equally characteristic of these systems, or that they are in fact respected, implemented and protected by all the MSs. Considering the purpose of Art. 2 TEU, it should be accepted that the "values common to the Member States" are the generalised values of the EU, derived from particular constitutional values of the MSs and transposed into the EU legal order. According to this

[58] *See* G. Gaus, *Subjective Value and Justificatory Political Theory*, 28 Nomos 241 (1986).

[59] F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford: 1991, p. 2.

[60] For more on EU value protection measures, *see e.g.* R. Hofmann, A. Heger, *Instrumente zum Schutz der Werteunion*, 104(4) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 340 (2021).

interpretation, the constitutional values of the MSs would only serve as a source of inspiration for the catalogue of fundamental values listed in Art. 2 TEU. Therefore, this provision would solely lay down the EU values – or more precisely, the legal values binding on the EU as a supranational organisation – while the expression "values common to the Member States" would merely indicate the origin of the values set out in Art. 2 TEU.

The phrase "values common to the Member States" can also be understood in a normative sense to mean legal values that, under Art. 2 TEU, have been defined as legal values common to the MSs. Thus, while these are the values on which the Union is founded, they are also common values for the MSs, legally binding not only on EU institutions and bodies, but also on the MSs themselves.[61] This approach clearly prevails in the CJEU case law. In the opinion 2/13, the CJEU affirmed that the constitutional structure of the EU is based on the fundamental premise that, firstly, each MS shares with all the other MSs (and recognises that they share with it) a set of common values on which the EU is founded, as specified in Art. 2 TEU, and secondly, that this premise implies and justifies a mutual trust between the MSs that these values will be recognised, and that the EU law implementing them will therefore be respected.[62] In its judgment, the CJEU also added that "national legal systems are capable of providing equivalent and effective protection for the fundamental rights recognised in the Charter, including Arts 1 and 4 of the Charter, which enshrine one of the fundamental values of the Union and its MSs, namely human dignity, which includes, inter alia, the prohibition of inhuman or degrading treatment."[63] In its judgment in *Achmea*, the CJEU explained that, thirdly, "it is precisely in that context" that the MSs are obliged – by reason of the principle of sincere cooperation set out in the first subparagraph of Art. 4(3) TEU, among other things – "to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure the fulfilment of the obligations arising from the Treaties or resulting from the acts of the EU institutions."[64] The Court's argument essentially follows this reasoning: the EU legal system is based on the normative

[61] *See* T. Rensmann, *Grundwerte im Prozeß der europäischen Konstitutionalisierung Anmerkungen zur Europäischen Union als Wertegemeinschaft aus juristischer Perspektive*, in: D. Blumenwitz, G.H. Gornig, D. Murswiek (eds.), *Die Europäische Union als Wertegemeinschaft*, Duncker & Humblot, Berlin: 2005, p. 57: "Wenn im Verfassungsentwurf festgestellt wird, daß die Werte der Menschenwürde, Menschenrechte, Demokratie und Rechtsstaatlichkeit allen Mitgliedstaaten der Union gemeinsam sind, so wird nicht nur auf die Genese dieser Prinzipien aus den Verfassungsüberlieferungen der Mitgliedstaaten abgestellt, sondern es wird gleichzeitig auch ein Sollensgebot im Sinne grundlegender Homogenitätsanforderungen an die Beitritts- und Mitgliedstaaten normiert."

[62] Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, para. 168.

[63] Joined Cases C-185/24 *RL* and C-189/24 *QS v. Bundesrepublik Deutschland*, EU:C:2024:1036, para. 30.

[64] Case C-284/16 *Achmea v. Slovak Republic*, EU:C:2018:158, para. 34.

premise that, firstly, an MS shares the values defined in Art. 2 TEU with the other MSs. The phrase "shares with the other Member States" should not be understood in a descriptive sense as a statement of actual adherence to these shared values, but rather as an obligation for the MS to respect and implement them. Secondly, an MS acknowledges that all the other MSs share with it the values set out in Art. 2 TEU, which means that common values are not shared by the MSs on the basis of reciprocity, but because the fact constitutes a legally enforceable obligation for each MS. Thirdly, the premise that an MS shares common values with the other MSs justifies the "existence" of some constitutional principles, such as the principle of mutual trust;[65] since the MSs are equal before the law and because they all share the same values, they have an equal right to trust from the EU and the other MSs.[66]

This line in case law is based on an implicit assumption that the statement "the Union is founded on the values" implies that these values not only underpin the law and actions of the EU institutions and bodies, and are legally binding on the Union as a supranational organisation, but also that the values set out in Art. 2 TEU serve as the foundation for the law and actions of institutions and authorities of the MSs, for which these values (as EU values) are legally binding. This interpretation of the first sentence of Art. 2 TEU is supported by both the case law of the CJEU, which is considered competent to review the compliance of the MSs' laws and constitutional systems with EU legal values – and which in fact performs such reviews – and by juristic interpretation of the provision, which is regarded as a "homogeneity clause". This clause in European constitutionalism signifies similarity, though not uniformity, of particular principles/values applicable in relations among the MSs (horizontally) as well as in their interactions with the European Union (vertically).[67] Ensuring such homogeneity is the responsibility of the CJEU, which must continue to safeguard the common, core constitutional values for the sake of integrity of the EU legal order. With regard to these values, the CJEU has no choice but to adopt a hierarchical approach.[68] Based on this approach to the

[65] *See* K. Lenaerts, *La vie après l'avis: Exploring the Principle of Mutual (yet not Blind) Trust*, 54(3) Common Market Law Review 805 (2017), p. 808, who believes that "the principle of equality of Member States before the Treaties is [...] the constitutional basis for the principle of mutual trust in the EU legal order."

[66] M. Claes, *The Equality of Member States, Research Handbook on General Principles*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *EU Law: Constructing Legal Orders in Europe*, Edward Edgar Publishing, Cheltenham: 2022, p. 115.

[67] M. Hilf, F. Schorkopf, in: E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, München: 2021, Art. 2 TEU, Rn. 9; for a narrower interpretation of this clause, *see* S. Mangiameli, *The Homogeneity Clause*, in: H.-J. Blanke, S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary*, Springer, Heidelberg: 2013, Art. 2 TEU, p. 143Nb: "Homogeneity aims to regulate the relationships between the Union and the MS. First of all, between the European Treaties and the constitutions of the MS, it expresses supremacy of the European constitutional order over those of the MS."

[68] M. Claes, *The Primacy of EU Law in European and National Law*, in: D. Chalmers, A. Arnull (eds.),

function and significance of Art. 2 TEU and the values listed in its first sentence, the homogeneity clause becomes a federalising clause, due to the subject matter of these values that are fundamental to the systems of the MSs.[69] The CJEU, which safeguards respect for these values in the MSs, strengthens its existing role as a driving force for European integration by acting as a stimulant to European federalisation. However, the federalising effect of Art. 2 TEU, resulting from the CJEU case law, raises serious constitutional concerns, given the shortcomings in the democratic legitimacy of the Court.[70]

The non-pluralistic interpretation of Art. 2 TEU as a homogeneity clause understood in such a way goes beyond its wording and purpose. After all, it stipulates that it is the Union, not the MSs, which is founded on the values mentioned therein. Since the statement that the Union is based on values does not describe the actual state of affairs and, moreover, the Union as a supranational organisation shows deficiencies and deficits in terms of democracy and legal protection, the teleological and functional interpretation of Art. 2 TEU should lead to the conclusion that its aim is not to ensure axiological homogeneity of the MSs' laws and constitutions under the supervision of the CJEU – as, in this respect, they are constitutionally homogeneous[71] – but rather to pursue further redevelopment of the EU law and organisation towards a fuller alignment with the values on which the Union is supposed to be founded.

3. PLURALISM OF LEGAL VALUES

The first sentence of Art. 2 TEU lists the following values upon which the Union is founded: "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Because it specifies several values, it raises the question of the formal

The Oxford Handbook of European Union Law, Oxford University Press, Oxford: 2015, p. 203.

[69] Hilf, Schorkopf, ***supra*** note 67, Art. 2 TEU: "Als Homogenitätsklausel soll Art. 2 EUV den Konsens zwischen den Mitgliedstaaten als Voraussetzung für die Integration vergegenwärtigen, die Legitimationsgrundlagen der EU sichern, den materiellen Gehalt für eine europäische Identitätsbildung stärken und generell die Funktionsfähigkeit der Union sicherstellen."

[70] *See* D. Grimm, *The Constitution of European Democracy*, Oxford University Press, Oxford: 2017, pp. 38–42; J. Mazák, M. Moser, *Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case Law*, in: M. Adams, H. de Waele, J. Mrrusen, G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, London: 2013, p. 85; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, Cambridge: 2012.

[71] In each MS, the rule of law holds the status of a constitutional principle of governance. The differences in the substance of this principle across individual states are not significant enough to necessitate harmonisation practices. The review of compliance with this principle in the national legal systems is within the purview of the constitutional courts of these states.

relationships among them, particularly whether they are hierarchical or non-hierarchical, with one possibility being value pluralism.

The idea of value pluralism is based on the following key propositions: (1) Value pluralism is not relativism; the distinction between what is good and what is bad has objective grounds and can be reasonably justified. (2) Objective goods cannot be fully ordered hierarchically. This means that there is no single evaluation criterion for all goods which are qualitatively distinct. Additionally, there is no *summum bonum*, i.e. the ultimate good for all individuals. (3) Some goods are fundamental or basic in the sense that they are part of any concept of human life that is worth choosing. (4) Outside the catalogue of basic goods, there is a broad range of justified diversity – individual ideas of a good life, as well as public cultures and public goals. This range of justified diversity defines the realm of individual freedom, deliberation and democratic decision-making. (5) Value pluralism is essentially distinct from value monism, i.e. the theory that either reduces goods to one fundamental value or creates a comprehensive hierarchy or order among goods.[72]

Regarding these claims of value theory, it should be pointed out that the first sentence of Art. 2 TEU does not establish a hierarchy of the values listed therein, nor does it define the relationships among them in any other way, which corresponds to the basic premise of value pluralism. However, this does not imply relativism of the legal values referred to in Art. 2 TEU, because these have objective grounds and can be reasonably justified, although it is not necessary. As mentioned above, the values in Art. 2 TEU are intrinsic, non-instrumental, fundamental and objective, and such values cannot be ordered hierarchically. This claim is supported by paragraph 6 of the Preamble to Regulation 2020/2092 on the general system of conditionality for the protection of the Union budget,[73] which reads: "While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect

[72] W.A. Galston, *The Implications of Value Pluralism for Political Theory and Practice*, Cambridge University Press, Cambridge: 2004, pp. 5–6.

[73] *See* W. Sadurski, *Constitutional Democracy in the Time of Elected Authoritarians*, 18(2) International Journal of Constitutional Law 324 (2020), p. 328: "a fully-fledged definition of democracy, even in its narrow, procedural sense, must incorporate these four characteristics: (1) free, fair, and regular elections which generate a government; (2) civil and political rights, in particular those which are instrumental to unconstrained political communication necessary for a democratic electoral choice; (3) separation or dispersion of powers which guarantees, at a minimum, that the entire political authority is not concentrated in a single person or small group of persons; (4) and the rule of law which requires the government to comply with legal rules, and in particular with constitutional rules which it cannot change at will whenever political expediency so demands."

for the rule of law and vice versa." This provision, while emphasising the lack of hierarchy among the Union values, makes the rule of law an instrumental value along with the related values, which is inconsistent with the nature of these values as fundamental, basic, intrinsic and objective. It is not possible to identify among the internal legal values one that is superior to all the others. Although respect for human dignity could be such a value, its role is essentially that of the source from which another internal legal value is derived, namely respect for human rights.[74] However, respect for human dignity is not a value from which it is possible to deduce a hierarchy of the values from Art. 2 TEU, or to claim that this value would hold the highest position in such hierarchy.

In accordance with the pluralistic approach, basic values are diverse, at least in the sense that none of them is an element of the substance of another value. From this perspective, the rule of law and respect for human rights – as values in themselves – are not part of the substance of the value of democracy, although they are strongly related therewith. The opposite view, which holds that the value of democracy embraces these two values, leans more towards a monistic position, according to which there is only one fundamental value that "permeates" other fundamental values;[75] according to this view, the only fundamental value would be democracy.[76]

The fundamental values listed in Art. 2 TEU are intrinsically and inseparably interconnected and integrated to the extent that they form a unity. The relations among these values are not formal but substantive. There is no doubt that the values are substantively interrelated and, in this sense, systemically organised. The assessment of effective law, its application process and its interpretation should, whenever possible and necessary, take all of these values into account as assessment criteria.[77]

The EU values set out in Art. 2 TEU serve not only as the axiological foundation for the development of the Union as a supranational organisation and the axiological justification for the EU legal system, but they are also, as legal values, essential components of the Treaty provisions. The latter, together with Art. 2 TEU, form the Union's constitutional charter and provide justification for the body of secondary law. They are applied in the process of interpreting and implementation the Treaties, and they serve as assessment criteria for existing law.

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[74] *See* A. Wróbel, in: A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union: A commentary], C.H. Beck, Warsaw: 2020, Legalis – commentary on art. 1 CFREU.

[75] C. Blum, *Value Pluralism versus Value Monism*, 38 Acta Analytica 627 (2023), p. 628.

[76] The key components of democracy are considered to include the rule of law and respect for fundamental rights – *see e.g.* Sadurski, *supra* note 73.

[77] R. Dworkin argues that we must try to "understand them holistically and interpretively, each in the light of the others, organized not in hierarchy but in the fashion of a geodesic dome" – R. Dworkin, *Justice in Robes*, Belknap Press, Cambridge: 2006, pp. 160–161.

4. EU LEGAL VALUES V. PRINCIPLES OF EU LAW

The axiological shift brought about by the Treaty amendments does not signify a replacement of the existing principles on which the Union was founded (Art. 6(1) TEU-Amsterdam)[78] with the values referred to in the first sentence of Art. 2 TEU. These constitutional principles of the EU remain in force within the Union's legal order, and Art. 2 TEU does not weaken their previous role or significance in European constitutionalism. It is therefore crucial to define the legal nature of the values set out in Art. 2 TEU and their relation to principles, especially those with identical names, such as the rule of law, democracy, human rights, etc. It should also be remembered that, as a result of constitutionalising the values listed in Art. 2 TEU, these are legal values of constitutional rank and significance. Art. 2 TEU does not refer to values outside the EU legal system, but rather incorporates them into this system, rendering it largely unnecessary to invoke their moral or natural-law origins and meaning. Furthermore, the values that inspired the Treaty framers and were incorporated into EU law are constitutional values common to the MSs, forming part of their constitutional traditions and identity.[79] Although the *Wertejurisprudenz* of constitutional courts and the axiological discourse on some MSs' constitutionalism are criticised,[80] it is primarily directed at the invocation in case law and constitutional legal scholarship of values that do not correspond substantively to constitutional principles – more precisely, at the use of extralegal values which are not listed and whose meaning is not defined by law. Ultimately, the criticism concerns the reliance in the legal discourse on values that are not listed in Art. 2 TEU.

The "legal nature" of the values set out in Art. 2 TEU eliminates the need to resolve the complex ontological and axiological issues that are generally associated with values. It is sufficient to recognise that the values on which the Union is founded are legally binding, just like the principles of EU law. Their legally binding force stems from their status as legal values of constitutional rank and significance, irrespective of whether EU law provides effective legal mechanisms for implementing them into secondary law and for protecting them against infringements by both EU bodies and MSs, to the extent that they apply EU law. On the other hand, the "positivisation" of values in Art. 2 TEU does not strip them of the elements that define them as values in non-legal discourse, nor does it erase the differences between values and principles that pertain to their analytical structure, function and

[78] The CJEU used this provision sparingly – *see* Spieker, *supra* note 17, p. 32.

[79] For a debate on the notion of "constitutional identity" and its instrumentalisation by illiberal governments to resist compliance with EU law, *see* J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford: 2023.

[80] E.-W. Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in: E.-W. Böckenförde (ed.), *Recht, Staat, Freiheit*, Suhrkamp, Frankfurt am Main: 2006, pp. 67–91.

justification.[81] It is important to emphasise that clarifying the relationship between the values in Art. 2 TEU and the general principles of EU law does not entail ethical or moral considerations. Even a cursory examination of these values suggests that they do not have the characteristics of moral values, and they therefore cannot be defined as individual fundamental, moral beliefs. The legal values set out in the first sentence of Art. 2 TEU are not moral values, which are inherently subjective in both their origin and application. "Legal values (*Rechtswerte* or *rechtliche Werte*) are not subjective attitudes (*Einstellungen*), but rather intersubjective legal substance. Legal values are positive legal statements concerning the desired state of affairs."[82] Therefore, the relationship between legal values and the principles of law is not an external, substantive relationship between morality and law, but rather a formal relationship between two legal modalities within the EU legal system – and to some extent external to it, but only with respect to other legal systems, particularly the domestic law of the MSs and international law. Thus, it is not the case, as it is sometimes claimed, that "principles are distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms"[83]: both legal values and principles are legal norms. The fundamental constitutional values listed in the first sentence of Art. 2 TEU, as legal norms, belong to the EU legal order to the same extent as the general principles of EU law; still, they do not form a separate axiological system that is distinct from the EU legal system. Nevertheless, the values enumerated in the first sentence of Art. 2 TEU are binding in both axiological and thetic (prescriptive) terms.[84] Their legally binding force is equal to that of the general principles of EU law.

In the legal literature, the legal nature of the values listed in the first sentence of Art. 2 TEU is primarily justified by the fact that EU law provides legal (and politi-

[81] *Contra* D. Kochenov, who thinks that "it is absolutely clear that what is meant by 'values' in this context is actually 'principles'– fundamental principles – of EU law" (D. Kochenov, *The Acquis and Its Principles: The Enforcement of 'Law' versus the Enforcement of 'Values' in the EU Law*, in: A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values Ensuring Member States' Compliance*, Oxford University Press, Oxford: 2017, p. 9).

[82] R. Luther, *Überlegungen zu einer positivistischen Integrationslehre. Die Bedeutung menschlicher Wertvorstellungen für die Interpretation des nationalen und europäischen Verfassungsrechts*, Duncker & Humblot, Berlin: 2023, p. 24.

[83] A. von Bogdandy, *Founding Principles*, in: A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing, C.H. Beck, Oxford: 2009, p. 22.

[84] "A norm is thetically valid if it has been established or recognized by an entity having specified authority over its addressee, particularly the authority of abstract nature based on competence-based legitimacy. On the other hand, a norm is axiologically valid if the behaviour it mandates (either in itself or together with its consequences) is right in someone's assessment, while the behaviour it prohibits (either in itself or together with its consequences) is wrong according to the same assessment" (S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa* [Outline of the Theory of Law], Ars Boni et Aequi, Poznań: 2001, pp. 39–40, cited by M. Kordela, *Teoria prawa Zygmunta Ziembińskiego* [Zygmunt Ziembiński's Theory of Law], 4(1) Filozofia Publiczna i Edukacja Demokratyczna 230 (2015), p. 247.

cal) instruments for their implementation and protection, such as Art. 7 TEU, EU judicial procedures and, more recently, the conditionality mechanism.[85] In other words, the normativity of values as legal norms largely depends on the existence of sanctioning norms within the legal system, namely, those that require that EU institutions and bodies, and to some extent the MSs, take legally prescribed actions so as to prevent infringement of these values or to impose legal sanctions on entities that breach the values.[86] This approach to justifying the legal nature of values is linked to the idea that these values are legal norms because they can be operationalised through the procedures for EU institutions and bodies, particularly the CJEU, applying and interpreting the law. This operationalisation occurs through the application of a specific and directly effective Treaty provision interpreted in light of Art. 2 TEU. As Luke Dimitrios Spieker points out, this underscores the significance and weight of Art. 2 TEU; at the same time, Art. 2 is interpreted in conjunction with a specific provision that makes it more precise.[87]

According to Spieker, Art. 2 TEU is a provision that is "suitable" for application by the courts, yet the application of Art. 2 TEU faces three options:

> First, Article 2 TEU could be perceived as mandatory *and* unconditional and thus apply as a self-standing provision.[88] Second, Article 2 TEU could lack a mandatory effect but still be unconditional. In this case, Article 2 TEU could be considered by the CJEU or national courts through some sort of (non-binding?) value-oriented interpretation of EU and national law. A third option would be that Article 2 TEU is mandatory but not unconditional. It would need to be applied with a more specific provision giving concrete expression to the values enshrined in Article 2 TEU.[89]

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[85] A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23(2) German Law Journal 131 (2022), p. 154: "It is evident that conditionality represents an appealing solution especially where ordinary tools of EU law enforcement cannot ensure adequate compliance with EU values, law and objectives, and it can contribute to ensuring the smooth functioning of key EU policies. At the same time, conditionality could exercise a divisive impact on the EU integration structure, and it also seems to push the EU back on the trail of international organizations rather than of a composite constitutional space."

[86] Scheppele, Kochenov, Grabowska-Moroz, *supra* note 35, pp. 3–121.

[87] Spieker, *supra* note 17, pp. 68–89.

[88] L.D. Spieker, *Defending Union Values in Judicial Proceedings: On How to Turn Article 2 TEU into a Judicially Applicable Provision*, in: A. von Bogdandy, P. Bogdanowicz, I. Canor, Ch. Grabenwater, M. Taborowski, M. Schmidt (eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Springer, Berlin: 2021, p. 245; *cf.* Scheppele, Kochenov, Grabowska-Moroz, *supra* note 35, pp. 3–121; Opinion of Advocate General Ćapeta to Case C769/22 *European Commission v. Hungary*, EU:C:2025:408, para. 218.

[89] Spieker, *supra* note 88, p. 245.

Spieker regards the judgment in Associação Sindical dos Juízes Portugueses (ASJP) as seminal. He believes that the Court's stance in ASJP could be "interpreted as making the values in Article 2 TEU judicially applicable through a mutual amplification with specific provisions of EU law." He notes that

> the decisions [of the CJEU] following *ASJP* reveal a twofold development. First, the Court is willing to scrutinize and sanction Member State actions under the operationalised Article 2 TEU. [...] Second, the CJEU seems to develop the diffused and decentralized EU judicial network into a value monitoring and enforcement mechanism. Today, violations of operationalised Union values can reach the CJEU not only via infringement proceedings initiated by the Commission [...] but also through preliminary reference procedures – either by "brave" national courts directly against national measures [...] or by courts in other Member States assessing cooperation with backsliding Member States under mutual recognition regimes.[90]

Whether the values listed in the first sentence of Art. 2 TEU are legal norms depends on whether legal norms can be reconstructed from these legal values. Unlike in the process of reconstructing a legal norm from a provision, this involves deriving a legal norm from a legal value embedded in that provision. The starting point for decoding a legal norm based on a legal value – such as human dignity – is the conviction that the value of human dignity, even if it is not explicitly formulated in a specific provision, is a norm in the sense that it mandates, prohibits or permits behaviour assessed as right or wrong from the viewpoint of respect for, implementation and protection of that value. This reasoning is in line with the institutional concept of law, which holds that:

> "Norms" are propositions that we formulate with reference to, and as singled-out elements of, normative order. In primary form, they are either exclusionary provisions (i.e., negative duties or prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (i.e., positive duties or obligations) that call for, or insist upon, certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action.[91]

Based on this premise, the task of an entity applying and interpreting EU law is essentially to translate the language of values into the language of law, that is, to recreate the substance of a legal norm from the substance of an axiological norm. Values

[90] *Ibidem*, p. 253.

[91] N. MacCormick, *Institutional Normative Order: A Conception of Law*, 82 Cornell Law Review 1051 (1997), p. 1054.

are not only criteria for assessing behaviour; they also serve as norms that prescribe particular behaviour. "[T]he evaluative and the normative bear an intimate relation: value is normative. This can be said to be one of value's fundamental properties."[92] The normativity of values means that "[v]alues are the normative patterns defining, in universalistic terms, the pattern of desirable orientation for the system as a whole, independent of the specification of situation or of differentiated function within the system."[93] "'Values' are not merely the de facto purposes, aims, goals, or ends actually pursued from time to time by individual persons or institutional agencies. They are actually pursued or possibly pursued states of being or of affairs which are conceived to be legitimate, desirable, worthy, or even (the scale ascends by degrees) mandatory for pursuit as standing purposes, aims, goals, or ends."[94]

In the process of decoding a legal norm from the fundamental EU values set out in Art. 2 TEU, one can draw inspiration from the respective fundamental principles of the EU specified in Art. 6 TEU-Amsterdam, the corresponding constitutional values of the MSs and values of international (both universal and regional) law. The recognition of and reference to the fundamental principles of the EU while reconstructing legal norms from fundamental values is justified by the substantive coherence of particular principles and values – for example, the principle of the rule of law and the value of the rule of law. Reference to the fundamental principles of the EU does not mean that these principles legitimise the fundamental values, as these values, by their nature, do not require any legitimacy. Nor does it mean that the fundamental principles of the EU hold a higher position than the fundamental values in the hierarchy of EU legal norms; on the contrary, the highest rank in the EU legal system is held by the fundamental values.

> The formal relations between values and general principles of law are based on various philosophical, legal and theoretical premises: for instance, "a general principle expresses a core value",[95] "general principles reveal the values which inspire the whole international legal order",[96] "in the legal system, principles of law are the normative forms of

[92] F. Orsi, *Value Theory*, Bloomsbury Publishing, London: 2015, p. 9.

[93] T. Parsons, E. Shils, K.D. Naegele, J.R. Pitts (eds.), *Theories of Society: Foundations of Modern Sociological Theory*, vol. 1, Free Press, New York: 1961, p. 44.

[94] N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press, Oxford: 2005, p. 192; *see* J. Habermas, *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge: 1996, p. 255: "principles or higher-level norms, in the light of which other norms can be justified, have a deontological sense, whereas values are teleological."

[95] T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford: 2007, p. 1.

[96] U. Linderfalk, *General Principles as Principles of International Legal Pragmatics: The Relevance of Good Faith for the Application of Treaty Law*, in: M. Andenas, L. Chiussi (eds.), *General Principles and the Coherence of International Law*, Brill, Leide: 2019, pp. 101–102.

values",[97] "principles which would reflect the fundamental values of the legal system",[98] "principles – are normative propositions that translate values into general 'constitutional' standards for policy action"[99] or "più diretta ed immediatamente espressiva forma di positivizzazione dei valori."[100]

When defining the relationship between the fundamental values (of the first sentence of Art. 2 TEU) and the general principles of EU law, one should take into account the fact that while the fundamental values constitute a uniform analytical category, the general principles of law are differentiated. It is possible to distinguish among them basic principles of EU law as a separate category, which includes the principles listed in Art. 6(1) TEU-Amsterdam, and thus the fundamental principles of EU law that correspond in name and substance to the values on which the Union is founded. It should even be posited that these values and principles are identical, i.e. that the fundamental principles corresponding to the fundamental values should have the same meaning as these values. It does not seem correct for the fundamental principle of the rule of law to have a different meaning and substance from the fundamental value of the rule of law. In this sense, the fundamental principles of EU law can be conceptualised as legal forms of fundamental values. However, this does not imply that values and principles hold an equivalent position within the EU legal order, because the values on which the Union is founded justify and legitimise the entire EU legal and institutional system, including the fundamental principles of the EU. These values are the source of EU law and institutional structure.

5. ROLE OF VALUES

Under Art. 2 TEU, the primary role of values is to provide foundation, justification and legitimacy. The statement "the Union is founded on the values" means that values serve as the foundation of the law, organisation and functioning of the EU. These are internal foundations in the sense that they are identified with internal values. The internal nature of these foundations highlights their ontological status as

[97] M. Kordela, *Zasady prawa jako normatywna postać wartości* [Principles of Law as a Normative form of Values], 1 Ruch Prawniczy, Ekonomiczny i Socjologiczny 39 (2006).

[98] U. Šadl, J. Bengoetxea, *Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice*, in: S. Vogenauer, S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives*, Hart Publishing, Oxford: 2017, pp. 41–52.

[99] S. Luciarelli, *Introduction*, in: S. Luciarelli, I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006, p. 10.

[100] A. Ruggeri, *Valori e principi costituzionali degli Stati integrati d'Europa*, 2–3 Teoria del Diritto e dello Stato 292 (2009), p. 296.

legal values. In other words, the foundations of law, organisation and functioning of the EU are not external, i.e. part of an extralegal axiological system. On the contrary, the values on which the Union is founded are explicitly set out in EU primary law, as mentioned above, and are therefore internal legal values. The values listed in Art. 2 TEU are more than just fundamental values; due to their inclusion in the Treaties, which have the rank and nature of the Union's constitutional charter, they are constitutional foundational values.[101] As the CJEU stated in its opinion (*Avis*) 1/17,

> The Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union "is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights", the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.

The national legal systems can ensure equivalent and effective protection of the fundamental rights recognised in the Charter, particularly in Arts 1 and 4, which establish one of the core values of the Union and its MSs: human dignity, which implies the prohibition of inhuman or degrading treatment.[102]

According to recent case law, these values "define the very identity of the European Union."[103] The CJEU adopted a measure in this regard that legitimised the federalising approach to values in the following way: first of all, it emphasised that "the values contained in Article 2 TEU have been identified and are shared by the Member States"; secondly, in the Kelsenian spirit, it identified the Union with the legal order; and thirdly, it defined the legal order as a "common legal order". As a result of this interpretation of Art. 2 TEU, the values on which the Union is founded are not values of the Union as an international organisation, but values of the Union as a common legal order, i.e. a legal order common to both the EU

[101] *See* L.S. Rossi, *Il valore giuridico dei valori. L'Articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, 19 Federalismi.it, 17 June 2020, pp. iv–v, available at: https://www.federalismi.it/nv14/editoriale.cfm?eid=562 (accessed 30 June 2025): "i valori [...] elencati nella prima frase dell'articolo 2 del TUE [...] possono non soltanto essere definiti come 'fondamentali', similmente ai principi contenuti nel titolo I del TUE. Essi rappresentano anche i valori 'fondanti' dell'Unione, veri pilastri della costruzione europea."; *cf.* Přibáň, *supra* note 56, p. 453: "Modern society cannot exist without values and their imaginaries, yet these cannot guarantee its existence and evolution. Values make sense, not foundations."

[102] Opinion 1/17 of the CJEU of 30 April 2019, EU:C:2019:341, para. 110.

[103] Case C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:98, para. 145.

and its MSs. Based on these premises, the Court concluded that "the Union must be able to defend these values, within the limits of its powers as laid down by the Treaties". It is worth noting that the term "Union" in this sentence does not refer to the Union as a common legal order, but to the Union as a supranational organisation authorised to defend these values when they are breached or threatened by actions or omissions of the MSs. There is no room here for the MSs to defend the values of Art. 2 TEU, which would be required by a common legal order based on the values that are common to and shared by all the MSs.

The values listed in Art. 2 TEU define the identity of the EU as a supranational organisation, rather than, as mistakenly assumed by the CJEU, the identity of a common legal order. Although the identity of the common legal order defined by the values of Art. 2 TEU has strong federalising and integrating connotations, the common legal order construct adopted by the Court does not take into account the essence of EU law as a "new legal order", independent from the legal orders of the MSs and international law,[104] whose defining feature is the autonomy that EU law enjoys in relation to the laws of the MSs and international law.[105] Moreover, the descriptive statement that "the values on which the Union is founded define the very identity of the European Union" does not imply how universal values, such as those listed in the first sentence of Art. 2 TEU, can identify the Union and its legal order and distinguish them from other legal orders and organisations based on the same set of values. These values, characterised as shared, universal and global, cannot be regarded as defining for the core of the EU constitutional identity. Properly understood identity requires and leads to diversity[106] and is protected as one of the elements of that diversity. Neither the CJEU's declared concept of the EU's identity, nor its case law limiting that identity, ensure or protect this diversity. The MSs base their legal orders on the same or similar sets of constitutional values. These values, often explicitly or implicitly stipulated in constitutional provisions, also define the constitutional identity of the MSs.[107] However, the identity is not shaped by the values on which the Union is founded (in the meaning assigned by the CJEU), but rather by the values specified in the constitutional law of the MSs and determined by their constitutional courts.[108] The values of the rule of law,

[104] Case C-26/62 *van Gend en Loos*, EU:C:1963:1.

[105] Opinion 2/13 of the CJEU of 18 December 2014, EU:C:2014:2454, para. 170.

[106] F. Schorkopf, *Staat und Diversität. Agonaler Pluralismus für die liberale Demokratie*, Brill Schöningh, Boston: 2017, p. 21.

[107] C. Calliess, G. van der Schyff, *Constitutional Identity Introduced*, in: C. Calliess, G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge: 2019, p. 7: "Constitutional identity is [...] defined as the core or fundamental elements or values of a particular state's constitutional order as the expression of its individuality."

[108] *See* Judgment of the Belgian Constitutional Court on the Fiscal Stability Treaty handed down on 28 April 2016 – the Court ruled that the Belgian Constitution does not permit the Union to infringe, in

democracy and respect for fundamental rights form the core of the constitutional identity of each EU MS. These values are both universal and global in nature, as they underpin the law and organisation of states and international organisations, and they are recognised and protected by both universal and regional international law. As a result, the constitutional values corresponding to the values listed in the first sentence of Art. 2 TEU not only do not individuate the constitutional legal order and system of a given MS, but they also do not distinguish this legal order from the constitutional legal orders of other states and international organisations. On the contrary, they are common values not solely to the MSs, but also to third countries (except for authoritarian states) and supranational and international organisations.

The reference to and recognition of values in the complex processes of legislating, applying and interpreting law guarantee the internal coherence of EU law and, with certain reservations, the external coherence of EU law and the law of the MSs. The coherence of any legal system, including the multifaceted EU legal system, always involves moral/axiological choices; a system of law that is immoral or devoid of values cannot be considered coherent. Adherence to the legal values set out in Art. 2 TEU is a necessary condition for ensuring axiological as well as formal coherence of law. The latter involves legitimising the norms of a given system through appropriate legislative authorisation, while the former requires justifying the norms of the system by means of the values they are meant to serve. In both contexts, i.e. democratic legitimisation and axiological justification, the legal values of Art. 2 TEU serve not only as reference but, above all, as legally binding norms addressed to lawmakers, law enforcement bodies and interpreters. It should be emphasised that the values are not instrumental in nature; it is not the values that are a means to ensure the coherence of a legal system, but rather the legal norms of that system – established, applied and interpreted in accordance with these values – that are instrumental to it. The greater the conformity between norms and values, the greater the coherence of the legal system to which these norms belong.

Ensuring the external coherence of EU law with the law of the MSs through the obligation to recognise, refer to and protect the values of Art. 2 TEU presents a challenge. On the one hand, it can be argued that the legal values upon which the EU is founded are values of the Union as a supranational organisation, which constitute the foundation of its identity, and therefore are legally binding only on the EU rather than its MSs. Furthermore, the argument for axiological coherence between the law of an MS and EU law is in fact raised in the reasoning of constitutional courts' rulings concerning the relation between these legal subsystems,

a discriminatory manner, upon "the national identity, inherent in the fundamental structures, political and constitutional, or the fundamental values of the protection conferred by the constitution upon the legal subjects"; Cloots, *supra* note 107, pp. 41–58.

particularly between a constitution and the Charter of Fundamental Rights of the European Union.[109] In light of this approach, Art. 2 TEU is not a homogeneity clause that would oblige solely the MSs to align their legal systems with values specific to the EU, which are safeguarded by the CJEU.[110] This clause, supported by the principle of primacy of EU law, has strong federalising characteristics[111] that are largely incompatible with European constitutional pluralism, where each MS's legal system and structure are in fact based on a set of diverse constitutional values, the protection of which is within the purview of the MS's bodies and institutions (courts). Undoubtedly, this set includes constitutional values corresponding in substance and meaning to the values set out in Art. 2 TEU, but the mere similarity or even identity of these values does not constitute sufficient and justified grounds for using them as review and assessment criteria for an MS's activity, particularly in domains that are within its exclusive competence.

CONCLUSION

Art. 2 TEU, stipulating that the Union is founded on the values common to its MSs, as introduced in the TEU, has led to a shift towards values in the processes of drafting, applying and interpreting EU law. This can be seen as a significant paradigm shift in the discourse on European constitutional pluralism. It represents a transition, yet not a departure, from the "Union of law" to the "Union of value", from a Union that is neutral towards values to one that is value-friendly. This paradigm shift is symbolised and illustrated by the reference to values in the case law of the CJEU (*Wertejurisprudenz*), the promotion of values in the EU's international relations and policies and the use of values to legitimise EU legislation and as a criterion for reviewing and assessing the MSs' activity, even in domains that are within their exclusive purview.

A characteristic feature of the values listed in Art. 2 TEU, on which the strength and scope of their impact on the EU legal and institutional system are directly dependent, is the fact that they are legal values and internal values, and as such they form an integral part of the founding Treaties. Due to their placement within

[109] For more on the "significant axiological coherence of Polish and EU law", *see* Polish Constitutional Tribunal, judgment of the 16 November 2011, SK 45/09, para. 2.10.

[110] *Contra* K. Lenaerts, who assumes that the ECJ must – in absence of harmonisation – ensure uniformity within "a core nucleus of shared values" (K. Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, in: M. Adams H. de Waele, J. Mrrusen, G. Straetmans (eds.), *Judging Europe's Judges*, Hart Publishing, Oxford: 2013, p. 29).

[111] *Cf.* S. Wheatherill, *Law and Values in the European Union*, Oxford University Press, Oxford: 2016, pp. 218–223, who recognises the principles of primacy and direct effect as fundamental principles that ensure the external coherence of EU law and the law of the MSs, the principles that shape EU constitutionalism.

the Treaty structure, they are fundamental values, and because of the Treaty's role as a constitutional charter, they are also foundational values. The listing of these values in Art. 2 TEU has objectified the values – their substance no longer depends on individual moral beliefs. They are legal norms that are legally binding on their addressees.

In the literature, Art. 2 TEU is often given the status and role of a homogeneity clause. However, with all due respect for this interpretative approach, I consider it inconsistent with the meaning of this provision, which was intended to strengthen the Union's legitimacy, and with the premises of European constitutional pluralism, which safeguards and protects the pluralism of values while opposing their uniformity and hierarchisation. It seems, however, that turning values into homogenising clauses that would unify the MSs' quantitatively and qualitatively diverse constitutional value standards – with the CJEU monitoring their compliance with as-yet undetermined EU models – as well as deriving particular obligations for the MSs from these values in conjunction with other Treaty provisions is taking it too far.

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EQUALITY OF MEMBER STATES AS A NEW RATIONALE FOR THE PRINCIPLE OF PRIMACY – AND ITS SIGNIFICANCE FOR THE CONSTITUTIONALISATION OF EU LAW**

Abstract: *In its recent jurisprudence the Court of Justice of the European Union (CJEU) has indicated new grounds for the principle of primacy of EU law: the equality of Member States before the Treaties. This reflects the view that the principle of primacy should not be perceived within a bilateral framework – as a means of resolving conflicts between two legal orders (EU and national) – but in a multilateral context, where uniformity, equality and primacy are strongly intertwined. The aim of this paper will be to analyse and assess the CJEU stance on this new foundation of the principle of primacy. It will be argued that the CJEU seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, is expected and justified after the Treaty of Lisbon and in the face of the current threats to the values embedded in Art. 2 of the Treaty on European Union. It is crucial for further strengthening of the processes of constitutionalisation of EU law. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU.*

Keywords: equality of Member States, primacy of EU law, constitutionalisation of EU law

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INTRODUCTION

The principle of primacy is a distinguishing feature of the EU legal order. It is the central instrument to guarantee the effectiveness of EU law at the national level.[1] Proclaimed in the jurisprudence of the Court of Justice of the European Union (CJEU), in the seminal judgment in *Costa*,[2] it establishes the pre-eminence of EU

[1] On the principle of primacy, from among synthesising approaches *see*: B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in: P. Craig, G. de Búrca (eds.), *The Evolution of EU law*, Oxford University Press, Oxford: 2021, pp. 188–192, 205–227; B. de Witte, *Direct Effect, Primacy and the Nature of the Legal Order*, in: P. Craig, G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford: 2011, pp. 323–362; M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford: 2006, pp. 97–117; K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe,* Oxford University Press, Oxford: 2001; P. Craig, G. de Búrca, *EU Law*, Oxford University Press, Oxford: 2020, pp. 303–352; A. Arena, *The Twin Doctrines of Primacy and Pre-emption*, in: R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Vol. 1*, Oxford University Press, Oxford: 2018, pp. 300–349; R. Schütze, *European Constitutional Law*, Oxford University Press, Oxford: 2021, pp. 193–224; K. Lenaerts, P. van Nuffel, *Union Law and its Effects in the National Legal Systems*, in: K. Lenaerts, P. van Nuffel, T. Corthaut (eds.), *EU Constitutional Law*, Oxford University Press, Oxford: 2022, pp. 632–639; M. Bobek, *The Effects of EU Law in the National Legal Systems*, in: C. Barnard, S. Peers (eds.), *European Union Law*, Oxford University Press, Oxford: 2017, pp. 161–167; J. Kranz, *Supremacy over Primacy...? Reflections on Legal Controversies between Poland and the European Union (2015–2023)*, 43 Polish Yearbook of International Law 13 (2023); C. Rauchegger, *Four Functions of the Principle of Primacy in the Post-Lisbon Case Law of the European Court of Justice*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe*, Edward Elgar Publishing, Cheltenham: 2022.

[2] *See* Case C-6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66. The Court further elaborated on the primacy principle in its subsequent jurisprudence, see in particular judgments in the following cases: C-11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* EU:C:1970:114; C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49; Joined Cases C-10/97 and C-22/97 *Ministero delle Finanze v. IN.CO.GE.'90 Srl et al.*, EU:C:1998:498; C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*, EU:C:2001:368; Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, EU:C:2010:319; C-409/06 *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503; C-314/08 *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, EU:C:2009:719; C-378/17 *The Minister for Justice and Equality and The Commissioner of An Garda Síochána* v *Workplace Relations Commission*, EU:C:2018:979; Joined Cases C-83/19, C-127/19, C195/19, C-291/19, C-355/19 and C397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others v. Inspecţia Judiciară and Others*, EU:C:2021:393; C-824/18 *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, EU:C:2021:153; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C840/19 *Criminal proceedings against PM and Others*, EU:C:2021:1034; C-430/21 *RS*, EU:C:2022:99; C-204/21 *Commission v. Poland*, EU:C:2023:442. See also the case law analysed in Craig, de Búrca, *supra* note 1, pp. 304–316.

law over the law of the Member States (MSs). The nature and implications of the principle of primacy involve many issues of fundamental importance, in view of both the nature of EU law and its effectiveness in national legal systems.[3] Although it might be considered one of the central subjects of EU legal scholarship, many of the characteristics of that principle still remain underexplored. The principle of primacy is still astonishingly undertheorized.[4] Crucially, some central issues of the primacy doctrine have only been explained by the CJEU in the recent years. Among those is the justification of the principle of primacy. In the hitherto CJEU case law the primacy principle was justified mainly in functional terms, as an instrument to ensure the effectiveness of EU law. In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of MSs before the Treaties. This reflects the view that the principle of primacy should not be perceived within a bilateral framework – as a means of resolving conflicts between two legal orders (EU and national) – but in a multilateral context, where uniformity, equality and primacy are strongly intertwined. The CJEU's position has led some commentators to conclude that it is now safe to say that the principle of primacy has found its way into the Treaties: Article 4(2) of the Treaty on European Union (TEU) is to be read as already containing a primacy clause. The aim of this article is to analyse and assess the CJEU's stance on this new foundation of the principle of primacy. It is argued that the Court seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, is expected and justified after the Treaty of Lisbon and in the face of the current threats to the values embedded in Art. 2 TEU. It is crucial for the further strengthening of the processes of constitutionalising EU law. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU.

1. NORMATIVE GROUNDS FOR THE PRIMACY PRINCIPLE

The principle of primacy has been proclaimed in the case law of the CJEU, yet has no explicit basis in the Treaties. There was an attempt to include it in the text of primary law during the work on the Treaty establishing a Constitution for Europe (Constitutional Treaty). In the Treaty of Lisbon, it was decided not to include a clause on the primacy of EU law; instead, only Declaration No. 17 on primacy was adopted, stating that "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on

[3] *See* the literature cited in fn. 1.

[4] M. Leloup, L.D. Spieker, *Rethinking Primacy's Effects: On Creating, Avoiding and Filling Legal Vacuums in the National Legal Systems*, 61 Common Market Law Review 913 (2024).

the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law." This declaration also referred to the opinion of the Council Legal Service on primacy.[5]

The primacy principle appears in the jurisprudence of the CJEU in the seminal judgment of *Costa*.[6] It was supported by the Court with two main arguments. The first referred to the specific character of the Community legal order and the nature of Community law, while the second referred to the objectives of the integration process taking place within the Community. In this first respect, the CJEU emphasised the autonomous nature of the Community legal order. The proclamation of the principle of primacy of Community law was a consequence of the autonomous nature and specificity of the Community legal order.[7] The EU legal system's self-referential nature meant that the criteria for determining the boundaries of the system and the scope of its norms were located within it.[8] The second argument justifying the principle of primacy of Community law over national law was teleological (functional) in nature. In the *Costa* judgment, the CJEU referred to the "spirit of the Treaty" and the need to ensure that its objectives are achieved. The Court stated that the Treaty aims of integration would be jeopardised if a MS unilaterally refused to give effect to an EU law that should bind all uniformly. In addition, in the early years of the Community, reference was also made to the egalitarian argument.[9] It follows from the CJEU's reasoning that if MS law could unilaterally take precedence over EU law, it would lead to discrimination in the application of EU law as between the MSs. It would also entail a MS enjoying the benefits of EU law without accepting all the burdens.[10] Lastly, the CJEU referred to what is now Art. 288 of the Treaty on the Functioning of the European Union (TFEU), which provides that regulations are directly applicable, and concluded that this provision would be meaningless if a MS could nullify its effects by means

[5] Opinion of the Council Legal Service of 22 June 2007, as set out in 11197/07 (JUR 260).

[6] *See* fn 2 above. For the origin of the case *see* A. Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, 30(3) European Journal of International Law 1017 (2019).

[7] As has been stated by the Court: "By contrast with ordinary international treaties, the EEC Treaty created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply [...]. The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

[8] *See* R. Barents, *The Precedence of EU Law from the Perspective of Constitutional Pluralism*, 5(3) European Constitutional Law Review 421 (2009), p. 426.

[9] *See* Craig, de Búrca, *supra* note 1, p. 305.

[10] *Ibidem*.

of a legislative measure which could prevail over Community law.[11] The doctrine points to the "bidimensional" nature of the principle of primacy, i.e. the fact that although it is defined by the CJEU, its full acceptance depends on its being incorporated into the constitutional orders of the MSs and affirmed by their supreme courts,[12] which generally seek its legal basis in national constitutional regulations.[13] This fact distinguishes the EU principle of primacy from analogous principles in federal systems. In federal systems, the relationship between the federation and its constituent parts is regulated by federal law. National courts respect the primacy of federal law on the basis of express provisions contained in the federal constitution. The situation is different in the EU – the justification developed by the CJEU in relation to the principle of primacy referring to the autonomy of the EU legal order is not generally shared by the courts of the MSs, which in principle treat their national constitutions as the *fons et origo* of the law applicable on the national territory.[14] In this context, the CJEU's argumentation regarding the foundations of the principle of primacy gains particular significance. It is an expression of the strengthening of the constitutionalisation processes taking place in the EU, which at the same time clash with tendencies threatening the uniformity of EU law, such as threats to the rule of law.

2. THE EQUALITY OF MSs BEFORE THE TREATIES AS NORMATIVE GROUNDS FOR THE PRINCIPLE OF PRIMACY IN THE RECENT JURISPRUDENCE OF THE CJEU

In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of MSs before the Treaties. The latter principle, introduced by the Lisbon Treaty in Art. 4(2) TEU, was recognised by the Court in the 1970s,[15] but then rarely relied on. Recently, it was invoked in a dispute where the authority of EU law was questioned. In an unprecedented press release,[16] the CJEU reacted to the PSPP judgment of the German Federal Constitutional Court

[11] As has been noted, that argument is of limited efficacy since Art. 288 TFUE refers only to the direct applicability of regulations, while the Court sought to establish the supremacy of all binding EU law.

[12] J. Weiler, *The Community System: The Dual Character of Supranationalism*, 1(1) Yearbook of European Law 267 (1981), pp. 275–276.

[13] de Witte, *supra* note 1, pp. 361–362.

[14] *Ibidem*, p. 362; Claes, *supra* note 1, passim.

[15] *See* Case C-39/72 *Commission v. Italy*, EU:C:1973:13; Case C-231/78 *Commission v. UK*, EU:C:1979:101; Case C-128/78 *Commission v. UK*, ECLI:EU:C:1979:32.

[16] Press release following the judgment of the German Constitutional Court of 5 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed 30 June 2025).

of 8 May 2020.[17] In a succinct manner the CJEU summarised its well-established case law on the foundational doctrines of EU law.[18] It is in the last two sentences where a new claim was made: national courts have to ensure the full effect of EU law since this is the only way of ensuring equality among the MSs.[19] The reasoning of the press release can therefore be reconstructed as follows: the EU law's primacy and the CJEU's authority to determine "what EU law is" serve to ensure a uniform interpretation of EU law, which in turn is crucial to ensuring equality among the MSs. As can be argued, such reasoning underpinned the position expressed by the Court in its judgment from a year and a half later, in the *Euro Box Promotion* case.

The judgment in *Euro Box Promotion* came as part of the CJEU's case law on changes to the judicial system in Romania and the problems of combating fraud and corruption, events which received only minor public attention compared to those in Poland and Hungary.[20] In May 2021, in the ruling of *Asociația "Forumul Judecătorilor din România"*,[21] the CJEU found Romanian laws concerning the personal liability of judges and prosecutors as well as disciplinary measures that undermined the independence of the judiciary to be incompatible with EU law. In its ruling, the Court emphasised the support given by EU institutions in

[17] Bundesverfassungsgericht [Federal Constitutional Court], judgment of 5 May 2020, 2 BvR 859/15, available at: http://www.bverfg.de/e/rs20200505_2bvr085915en.html (accessed 30 June 2025).

[18] Though without mentioning any of the words "autonomy", "direct effect", "supremacy" or "primacy". *See* J. Lindeboom, *Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment*, 21(5) German Law Journal 1032 (2020), p. 1033. *See also Editorial Comments*, 4 Common Market Law Review 1 (2022).

[19] The full version of the press release reads as follows: "In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings (Case C-446/98, *Fazenda Pública v. Câmara Municipal do Porto*, EU:C:2000:691, para. 49). In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty (Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, EU:C:1987:452, paras. 15 and 17). Like other authorities of the MSs, national courts are required to ensure that EU law takes full effect (Case C-212/04 *Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443, para. 122). That is the only way of ensuring the equality of Member States in the Union they created."

[20] *See* P. Filipek, M. Taborowski, *Decoding the Euro Box Promotion case: Independence of Constitutional Courts, Equality of States, and the Clash in Judicial Standards in View of the Principle of Primacy Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion and Others, Judgment of the Court (Grand Chamber) of 21 December 2021, EU:C:2021:1034*, 61(3) Common Market Law Review 831 (2024); D. Călin, *Constitutional Courts Cannot Build Brick Walls between the CJEU and National Judges Concerning the Rule of Law Values in Article 2 TEU: RS, Case C-430/21, RS, Judgment of the Court (Grand Chamber) of 22 February 2022 EU:C:2022:99*, 60(3) Common Market Law Review 819 (2023); F. Weber, *The Identity of Union Law in Primacy: Piercing Through Euro Box Promotion and Others*, 7(2) European Papers 749 (2022).

[21] Case C-83/19 *Asociația "Forumul Judecătorilor din România"*, EU:C:2021:393.

establishing an independent judiciary in Romania, and it affirmed – against the Romanian Constitutional Court – that the primacy of Union law also prevails against constitutional norms interpreted by the latter.[22] Following the judgment in *Asociația "Forumul Judecătorilor din România"*, the Romanian Constitutional Court prohibited national courts from examining the compatibility with EU law of national provisions that had already been declared compatible with the Constitution.[23] That was addressed in turn by the CJEU in the *RS* judgment,[24] where the ECJ confirmed that national rules or practices under which the ordinary courts of a MS have no jurisdiction to examine the compatibility with EU law of national legislation are incompatible with the essential requirements of EU law. That case concerned legislation which the Constitutional Court had found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

In *Euro Box Promotion*, the disputes concerned criminal proceedings in which the High Court of Cassation and Justice had convicted several individuals, including former parliamentarians and ministers, of tax fraud, corruption and abuse of office, particularly in connection with the management of EU funds.[25] Then, the Romanian Constitutional Court overturned these decisions on the grounds of unlawful court composition. The rulings of the Romanian Constitutional Court posed a systemic risk of impunity for fraud and corruption affecting the EU's financial interests, as the court proceedings would have to be repeated, despite already being lengthy, complex and thus unlikely to be completed before the statutory limitation period expired. Such a situation would undermine the objectives of EU law to effectively deter and punish such offences, and would be contrary to the MS's obligations.[26] In the preliminary proceedings the referring courts asked the CJEU whether, under EU law, they can disapply certain decisions delivered by the Curtea Constituțională (Constitutional Court).

The CJEU confirmed that the principle of primacy of EU law precludes national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot disapply, on their own authority, the case law established in those decisions, even though they are of the view, in the light of a judgment of the CJEU, that that case law is contrary to the provisions of EU law.[27] The Court reasoning referred to issues crucial for the EU

[22] *Ibidem*, paras. 49-51, 179 ff., 219, 222, 239 ff. and 242–252.

[23] Constitutional Court, decision of 8 June 2021, No. 390/2021; *see* Călin, *supra* note 20, pp. 821–822.

[24] Case C-430/21 *RS*, EU:C:2022:792.

[25] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034.

[26] *See* Filipek, Taborowski, *supra* note 20, p. 832; Weber, *supra* note 20, pp. 750–752.

[27] It should be noted that following the CJEU judgment, the Romanian Constitutional Court released a public statement in which it refused to recognise its effect, pretending that its own decisions "remain

legal order: effective judicial protection, the rule of law, judicial independence and the proper composition of courts. The important part of the judgment concerned the principle of primacy. In this respect the CJEU invoked its fundamental rulings of the early years of accession, recalling that the establishment of the Community's own legal system – accepted by the MSs on the basis of reciprocity – means that they cannot accord precedence to a unilateral and subsequent measure over that legal system, nor can they rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question.[28] The CJEU recalled that in its Opinion 1/91,[29] it found that the EEC Treaty, although it takes the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law, and that the essential characteristics of the Community legal order thus established are its primacy over the law of the MSs and the direct effect of a whole series of provisions which are applicable to their nationals and to the MSs themselves.[30] At the same time, the CJEU alone has the jurisdiction to give the definitive interpretation of EU law. In the exercise of that jurisdiction, it is ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law. To that end, the procedure for preliminary rulings provided for in Art. 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the CJEU and the courts of the MSs, having the object of securing the uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties.[31] As a result, the principle of primacy requires the national court to give full effect to the requirements of EU law in disputes brought before it by disapplying any national rule or practice that is contrary to a directly effective provision of EU law, without being requested and without waiting for that national rule or practice to be set aside by legislative or other constitutional means.[32] Any rule or practice

generally binding". *See* Press release, 23 December 2021, available at: https://www.ccr.ro/en/press-release-23-december-2021/?utm_source=chatgpt.com; *see also* B. Selejan-Gutan, *Who's Afraid of the 'Big Bad Court'*?, Verfassungsblog, 10 January 2022, available at: https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/ (both accessed 30 June 2025). It added that any power of domestic courts to disapply national legislation contrary to the provisions of EU law first requires revision of the Constitution.

[28] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 246.

[29] First Opinion of the EEA Agreement of 14 December 1991, EU:C:1991:490.

[30] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 247.

[31] *Ibidem*, para. 254.

[32] *Ibidem*, para. 252.

of domestic law that withholds from the court the power to disregard a national rule or practice which might prevent EU rules from having full force and effect is incompatible with the requirements which are the very essence of EU law.[33] The reasoning of the Court constituted a concise, yet rich summary of its case law on the principle of primacy. What was novel was the reference to the equality of MSs before the Treaties as the justification of that principle.

In *Euro Box Promotion* the CJEU stated that "[it] must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature."[34] The reference to the equality of MSs before the Treaties as the normative basis of the primacy principle was strengthened in subsequent cases. In *RS*[35] the phrase "it should be added"[36] disappeared. In *Commission v. Poland* the equality argument was stated even more clearly. The ECJ treated compliance with the primacy principle as "necessary in particular in order to ensure respect for the equality of Member States before the Treaties."[37] This statement was confirmed in its further jurisprudence.[38] It is also worth noting that in *Euro Box Promotion*, as well as in the cases cited above, the subject of the CJEU rulings was issues related to the rule of law, in particular the independence of courts – issues fundamental to the EU legal order. It was in the framework of these cases, in the Romanian and Polish contexts, that the CJEU developed a new justification for the principle of primacy.

3. CONSTITUTIONAL SIGNIFICANCE OF THE EQUALITY ARGUMENT FOR THE PRINCIPLE OF PRIMACY

The CJEU's position, as expressed in its recent jurisprudence, can be construed as corresponding to the views presented in the literature that the principle of primacy is not just a means of resolving bilateral conflicts between two legal orders – the EU's and MSs' – but is first and foremost a grounding principle ensuring that all

[33] *Ibidem*, para. 258.

[34] *Ibidem*, para. 249.

[35] Case C-430/21 *RS*, EU:C:2022:792, para. 55.

[36] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 249.

[37] Case C-204/21 *Commission v. Poland*, para. 77. *See* C. Krenn, *Warum Unionsrecht Vorrang hat: Zur aktualisierten Begründung des Vorrangprinzips in den Urteilen Euro Box Promotion und R.S.*, 1 Europarecht, Beiheft 59 (2024), p. 64.

[38] Joined Cases C-615/20 and C-671/20 *YP and Others*, EU:C:2023:562, para. 62; C-123/22 *Commission v. Hungary*, EU:C:2024:493, para. 122.

MSs are treated equally before the law.[39] Such views were elaborated by Frederico Fabbrini and Koen Lenaerts. Fabbrini was the first to propose the (principle of) equality of MSs as the normative basis of the principle of primacy. He justified this view with an argument referring to a multilateral perspective. As he explained, the struggle for the primacy of EU law should not be interpreted within a bilateral framework – opposing the CJEU to the highest court of a single MS. It should rather be perceived in a multilateral context, where action by one MS (its highest court) also affects the other MSs (and their courts). From this perspective, it stems that only the primacy of EU law can guarantee the equality of MSs before the law.[40] Fabbrini justified the principle of equality of the MSs as the basis of the principle of primacy in the context of the Court judgment in *Costa v. Enel*,[41] where the Court emphasised that "[t]he integration into the laws of each Member State of provisions which derive from the [EU] [...] make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them *on a basis of reciprocity*."[42] Another foundational judgment of the CJEU which justifies the principle of equality of the MSs as the basis of the principle of primacy, according to Fabbrini, is the Court judgment in *Commission v. Luxembourg and Belgium*.[43] In this case, the Court rejected any use by the MSs of general international law instruments of "self-help", such as retaliation and counter-measures, against another MS which failed to respect EU law. It is because the EU has supremacy over national law – and the contracting parties abide by this rule – that the MSs are not entitled to tit-for-tat retaliation for violations of EU law. Hence, a MS (its highest court) should not be allowed to undermine the primacy of EU law, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them.[44]

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[39] K. Lenaerts, *No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties*, Vefassungsblog, 8 October 2020, available at: https://verfassungsblog.de/no-member-state-is-more-equal-than-others/ (accessed 30 June 2025). *See also* F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) German Law Journal 1003 (2015); V. Perju, *Against Bidimensional Supremacy in EU Constitutionalism*, 21(5) German Law Journal 1006 (2020); K. Lenaerts, *L'égalité des* États *membres devant les traités: la dimension transnationale de la primauté*, 4 Revue du droit de l'Union Européenne 7 (2020); K. Lenaerts, J. Gutierrez-Fons, S. Adam, *Exploring the Autonomy of the European Union Legal Order*, 81(1) Zeitschrift für ausländisches *öffentliches* Recht und Völkerrecht 47 (2021), p. 70.

[40] Fabbrini, *supra* note 39, p. 1005. Fabbrini uses the term "supremacy" which is used here interchangeably with the term the "primacy".

[41] Case C-6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66, para. 585.

[42] *See* Fabbrini, *supra* note 39, p. 1015.

[43] Joined Cases 90/63 and 91/63 *Commission v. Luxembourg and Belgium*, EU:C:1964:80.

[44] *See* Fabbrini, *supra* note 39, pp. 1015–1016.

Three implications of "equality of the Member States before the Treaties" have been emphasised by Lenaerts.[45] Firstly, the uniform interpretation and application of EU law are key for guaranteeing that equality. Secondly, the uniform interpretation of EU law needs to be ensured by one court only, i.e. the CJEU. Thirdly, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court – is "the supreme law of the land", as primacy (*Anwendungsvorrang*) guarantees that normative conflicts between EU law and national law are resolved in the same fashion. Primacy thus guarantees that both the MSs and their peoples are equal before the law. As it is emphasised, those three implications are deeply intertwined.[46] Without uniformity, there is no equality of the MSs before the law. Without the CJEU, there is no uniformity. Without primacy, there is no uniformity, and thus no equality. It is only by the judicial enforcement of uniformity and the primacy of EU law that European citizens find equal justice under that law.[47] According to Lenaerts, since there is an unbreakable link between the equality of the MSs before the Treaties, the uniform interpretation of EU law and the primacy of that law, "it is now safe to say that the principle of primacy has found its way into the Treaties. In effect, Article 4(2) TEU is to be read as already containing a Primacy Clause. The incorporation of a Treaty provision containing an additional Primacy Clause would thus be, to some extent, redundant."[48]

At the same time, it is worth noting that equality as the principle behind the primacy of EU law can be understood in broader terms than is currently present in the CJEU case law. According to the views presented in the legal scholarship, it is not only the equality of MSs before the Treaties, but also the equality of European citizens that justifies the principle of primacy as determining the relationship between national and EU law.[49] As Ingolf Pernice has underscored when commenting on the Court's judgment in *Costa*, the supremacy of EU law is connected with the principle of non-discrimination. For every individual, the trust in the full respect of equally applicable terms of law by all the others justifies its own obedience. There cannot be privileges nor discrimination. It is ultimately the reciprocity of such mutual trust among citizens as among their MSs which allows a legal system to function.[50] It will

[45] Lenaerts, *supra* note 39.

[46] *Ibidem*.

[47] *Ibidem*.

[48] *Ibidem*. *See also* the interview with the President of the Court of Justice K. Lenaerts – C. de Gruyter, *President Koen Lenaerts: "Europese Hof komt meer center stage"*, NRC, 17 May 2020, available at: https://www.nrc.nl/nieuws/2020/05/17/president-koen-lenaerts-europese-hof-komt-meer-center-stage-a4000000 (accessed 30 June 2025), cited after the translation of Lindeboom, *supra* note 18, pp. 1033–1034.

[49] That argument has been developed by Marcus Klamert. *See* M. Klamert, *Supremacy, the Uniformity of EU Law, and the Principle of Equality*, 9(1) Austrian Law Journal 82 (2022). *See also* Fabbrini, *supra* note 39, p. 1015. Lenaerts, *supra* note 39.

[50] *See* I. Pernice, *Costa v ENEL and Simmenthal: Primacy of European Law*, in: M. Maduro, L. Azoulai (eds.), *The Past and Future of EU Law*, Hart Publishing, Oxford: 2010.

be interesting to see whether this line of argumentation, grounding the principle of primacy not only in the equality of MSs, but also in the equality of EU citizens, shall be developed in the further jurisprudence of the CJEU.

As can be argued, the concept of linking the primacy principle to the principle of equality has profound implications for the status of the former in the EU's constitutional order and for the relationship between EU and national law. Some commentators point out that the new concept reflects a Kelsenian rather than a Hamiltonian perspective for the structure of the legal order.[51] According to Lindeboom, the CJEU's argument on the linkage between primacy and equality is virtually a copy of Kelsen's argument in favour of the primacy of international law, and the shift in the Court's jurisprudence is inconsistent with its previous case law, which fitted rather the Hamiltonian model of the federal legal order.[52] However, as can be argued, the crucial difference from the Kelsenian paradigm is the EU orientation on values.[53] From this perspective, one may argue that by grounding the primacy principle in the principle of equality, the unique architecture of the EU's constitutional structure and the relationship between EU law and national law are further strengthened and developed. Such new foundations reaffirm the primacy principle in the legal order of the EU. Linking the structural, systemic principle of primacy to equality – a substantive, fundamental principle of the EU – reveals a new development in the process of the constitutionalisation of EU law. In this new architecture the principle of effectiveness does not seem to be the grounding (meta)principle for the primacy principle, but rather the concept inherent within the primacy claim.[54] The functionalist approach to constitutionalism seems to be replaced by the turn to values which provide the foundations for the integration process.

However, the CJEU's stance – grounding the primacy principle on the principle of equality – is not free of controversy. The main argument in favour of the view that equality among the MSs provides the legal basis for the primacy principle has been the lack of an exception of non-performance in the system of EU law.[55] This

[51] *See* Lindeboom, *supra* note 18, pp. 1042–1044.

[52] *Ibidem*.

[53] For the value-based conception of equality, *see* K. Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, 54 Common Market Law Review 805 (2017).

[54] That would correspond to the conception of law which includes the primacy claim within it. *See* J. Raz*, The Authority of Law*, Clarendon Press, Oxford: 1979, ch. 2. In other words, to claim the primacy of law means to claim that it ought to be effective. For more on this point, *see* Lindeboom, *supra* note 18, p. 1044.

[55] *See* the Joined Cases 90/63 and 91/63 *Commission v. Luxembourg and Belgium*, EU:C:1964:80 as referred to by Fabbrini, in which the Court rejected any use of inter-state countermeasures for the enforcement of European obligations.

absence is justified by the primacy of EU law. It follows that the MSs should not be allowed to undermine the primacy of EU law, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them.[56] Such reasoning has been questioned be legal scholars.[57] As has been argued, the exception of non-performance is entirely irrelevant to both primacy and equality among the MSs, and the correlation is wrong both ways. Firstly, the doctrine exists in international law notwithstanding the latter's primacy over national law. Secondly, the reason that the doctrine does not exist in EU law is because it has a system of judicial protection which delegates the task of enforcement to national and EU courts.[58] That stems from the ECJ's judgment in *Commission v. Luxembourg and Belgium*.[59] The absence of an exception of non-performance is crucial to the full effect of EU law, but to link it to EU law primacy is to mistake the latter for the modalities of enforcement which the legal order employs.[60]

To address the above argument it seems appropriate to recall the conclusions of recent research on the history of European integration, which are supported by the analysis of scholarly publications by CJEU judges and scholars, both in the 1960s and later.[61] The findings of such research is that three fundamental decisions of the early years of the European integration – *Van Gend en Loos*, *Costa* and *Luxembourg and Belgium* – should be acknowledged as profoundly interconnected, in that applying European obligations in national courts should be understood as a substitute for enforcing European obligations through inter-state countermeasures. Importantly, *Van Gend en Loos* and *Costa* must be understood not just as a vehicle for individual rights, but at least as importantly as an instrument of inter-state law and politics, and that each of these three famous Court's decisions must be studied in the context of its relationship with the other two. The argument goes that the rejection of enforcement through inter-state countermeasures, as set out in *Luxembourg and Belgium*, was premised on the MSs' acceptance of national court enforcement of European law obligations – that is to say, the doctrines of direct effect, as set out in *Van Gend en Loos*, and supremacy, as set out in *Costa*.[62]

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[56] *See* Fabbrini, *supra* note 39; Lenaerts *supra* note 39.

[57] *See* Lindeboom, *supra* note 18, pp. 1032–1044.

[58] *Ibidem*, p. 1037.

[59] Joined Cases 90/63 and 91/63 *Commission v. Luxembourg & Belgium*, EU:C:1964:80, at 631 ("[The Treaty] establishes a new legal order which governs the powers, rights and obligations of the said persons, *as well as the necessary procedures for taking cognizance of and penalizing any breach of it*. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands") [italics added by Lindeboom].

[60] *See* Lindeboom, *supra* note 18, p. 1037.

[61] *See* W. Phelan, *Supremacy, Direct Effect and Dairy Products in the Early History of European Law*, 14(1) International Journal of Constitutional Law 6 (2016).

[62] *Ibidem*, pp. 7, 25.

In view of the above findings, one may defend the view that a link can be construed between the role of primacy in EU law and the absence of an exception of non-performance. That conclusion may lead to construing a link between the primacy of EU law and the equality of MSs. However, the question remains: can the above explanation of the legal/political context of the three fundamental decisions from the early years of European integration (*Van Gend en Loos*, *Costa* and *Luxembourg and Belgium*) serve to exclude the possibility of the MSs performing *ultra vires* control? Such an assumption seems to be inherent in the views of the proponents of the new rationale for the principle of primacy. As has been pointed out in the literature,[63] there are arguments to deny this conclusion: the *Costa* judgment should not be read as rejecting the possibility of *ultra vires* control by the MSs. This judgment refers to unilateral, subsequent measures of the MSs – prohibited by the Court, which should not be equated with *ultra vires* control of the MSs.[64] This perspective suggests that the above-mentioned trio of cases cannot justify formulating the principle of equality in such a way as to exclude *ultra vires* control.[65] However, with respect to such a stance, and the interpretation of the *Costa* judgment in particular, one may construe the counterargument that what is crucial to reconstructing the significance of this case is the notion of autonomy of EU law inherent there. The notion of autonomy implies what was subsequently clearly articulated in the CJEU jurisprudence: the Court alone is competent to determine EU law. In the exercise of that jurisdiction, it is ultimately for the CJEU to clarify the scope of the principle of the primacy of EU law in the light of its relevant provisions; that scope cannot turn on the interpretation of provisions of national law or on a national court's interpretation of EU law which is at odds with that of the Court.[66] By virtue of the principle of the primacy of EU law, a MS's reliance on rules of national law, even of a constitutional nature, cannot be allowed to undermine the unity and effectiveness of EU law.[67] As can be argued, such a position of the CJEU excludes the *ultra vires* control by the MSs, which could undermine the primacy of EU law, and the arguments to reject such a conclusion should not be derived from the textual reading of the *Costa* judgment. There is no doubt that the case law of the Court, when interpreted in the context of its subsequent evolu-

[63] *See* J. Kokott, D. Hummel, *Der Vorrang des Unionsrechts als Ausdruck des Gleichheitsprinzips? zu einem neuartigen Begründungsansatz der Einschränkung einer Ultra-vires Kontrolle durch die Gerichte der Mitgliedstaaten*, 51(1–9) Europaische Grundrechte Zeitschrift 1 (2024), p. 2, referring to the ECJ judgment in *Costa*: "the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws" *also* "the Member States have limited their sovereign rights, albeit within limited fields".

[64] *Ibidem*.

[65] For arguments against challenging *ultra vires* control, *see ibidem*, pp. 4–7.

[66] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 254 and the case law cited therein.

[67] *Ibidem*, para. 251.

tion, necessitates that the MSs acknowledge the absolute principle of primacy and accept that the CJEU determines the limits of EU law. In this sense, the principle of primacy – which is intrinsically linked to the autonomy of EU law as affirmed and developed through the CJEU's case law – takes on the function of a federalising principle. The principle of primacy is perceived not only as a conflict rule, but also as a principle which excludes *ultra vires* control by the MSs. In its reasoning the CJEU also included this second aspect of this principle,[68] and the strengthening of its justification expressed in its recent jurisprudence is consistent with and supports such an understanding of this principle.

However, the understanding of the principle of primacy developed in the jurisprudence of the CJEU may encounter counterarguments based on constitutional pluralism or the idea that the legitimacy of the EU legal order is derived primarily from national constitutions. It can be argued that the new rationale for the principle of primacy does not invalidate these old arguments, which point, for instance, to the limited scope of the transfer of competences to the EU, or to the fact that the Court's assertion of its exclusive authority to determine EU law cannot prevent national courts, acting within the framework of *ultra vires* review, from interpreting *national law* in a manner that may conflict with the interpretation of EU law provided by the CJEU. The dispute over the ultimate authority within the EU legal framework thus remains unresolved. The only viable path to preventing potential conflicts appears to lie in developing a mutual willingness to cooperate between the CJEU and the highest courts of the MSs.[69] In this context, maintaining the principles of judicial dialogue[70] and acknowledging the existence of certain "red lines" – above all, respect for liberal democratic values – seems essential. From this standpoint, the recognition of *ultra vires* review cannot serve to justify positions such as that taken by the Polish Constitutional Tribunal in its dispute with the CJEU.[71]

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[68] It is worth noting that the principle of equality of the MSs as a justification of the principle of primacy appeared for the first time in the press release issued after the ruling of the German Constitutional Court of 5 May 2020 (*see* fn 19).

[69] *See* Kokott, Hummel, *supra* note 63, pp. 5–7; Krenn, *supra* note 37, pp. 59–69. This presupposes a willingness on the part of national courts to submit preliminary references to the ECJ in cases of potential conflict and, on the part of the Court itself, a readiness to thoroughly and carefully consider such questions, within the framework of open, substantive dialogue that takes due account of the constitutional sensitivities of the MSs (Kokott, Hummel, *supra* note 63, p. 7).

[70] *See e.g.* the conceptualisation of the relationship between the ECJ and the national courts in M.P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in: N. Walker (ed.), *Sovereignty in Transition*, Oxford University Press, Oxford: 2003, pp. 501–538; M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1(2) European Journal of Legal Studies 137 (2007).

[71] For more on this point, *see* A. Sołtys, *The Court of Justice of the European Union in the Case Law of the Polish Constitutional Court: The Current Breakdown in View of Polish Constitutional Jurisprudence Pre-2016*, 15 Hague Journal on the Rule of Law 19 (2023).

While the normative weight of the equality-based argument for resolving the dispute over final authority in EU law may be subject to criticism, its persuasive force should nonetheless be acknowledged and appreciated. As has been observed in the literature on the subject, for a decade now the CJEU has been complementing and indeed overwriting its long-standing functionalist approach to constitutionalism. A new, a principled constitutionalism is emerging that draws from the first nineteen articles of the EU Treaties and activates the potential of the EU's constitutional core.[72] The search for new grounds of the primacy principle can be perceived as a part of this process.

CONCLUSIONS

In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of the MSs before the Treaties. That stance was built on a vision of the EU legal order where the equality of the MSs before the Treaties, the uniformity of EU law and the primacy of that law are strongly intertwined, and it is the CJEU that guarantees them. It has been argued here that the Court, in its case law, seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, can be justified in the post-Lisbon architecture of the EU legal order. Moreover, it is to be expected, given the current threats to values embedded in Art. 2 TEU. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU. As can be argued, the strengthening of the justification of the primacy principle furthers the processes of constitutionalisation of EU law, though it does not override the reservations concerning the absolute primacy principle or the claim that the CJEU is the sole authority to answer the question of Kompetenz-Kompetenz – reservations articulated from the perspective of constitutional pluralism or concepts that derive the legitimacy of the EU legal order primarily from national constitutions. It can nevertheless be argued that this new line of reasoning articulated by the CJEU carries significant persuasive weight in the ongoing debate that is crucial for the future direction of EU integration. The axiological justification of the principle of primacy reinforces its status as a constitutional principle of the EU legal order. It can be perceived as a part of a broader process in which, for over a decade now, the CJEU has been complementing and indeed overwriting its long-standing functionalist approach to constitutionalism.[73] At the core of this process appears

[72] *See* J. Bast, A. von Bogdandy, *The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism*, 61 Common Market Law Review 1471 (2024).

[73] As to this process *see ibidem*.

to be the shaping of the EU's constitutional identity. Any confrontation with the principle of primacy, built on such foundations, by the MSs (or their constitutional courts) will inevitably have to take into account these new normative frameworks and justifications.

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EXPLORING ASYMMETRIES OF MARKET INTEGRATION AT THE INTERSECTION OF HEALTH PROTECTION AND MOBILITY DURING THE PANDEMIC AND THE EFFECTS ON THE RIGHTS OF INDIVIDUALS IN THE EU**

Abstract: *Drawing on the theoretical approach of F.W. Scharpf (2012), as critically contested by M. van den Brink, M. Dawson and J. Zglinski (2023), the article unearths the implications for individual rights at the intersection of health protection and freedom of movement of persons in the European Union's integrated market during the pandemic. The findings are based on empirical analysis of the CJEU case law and European secondary laws adopted in the context of counteracting the COVID-19 pandemic (2020–2022). The text shows that the Court of Justice of the European Union (CJEU) has adopted a variety of approaches in its standard of review towards national regulatory measures (either strict or deferential review), while many secondary laws were adopted at the EU level to pursue market correction policies (e.g. crisis preparedness or protection of health data). Thus the research confirms that the current internal market dynamics in the areas of health and movement of persons is indeed too complex to be described solely by the original asymmetry thesis. Yet, it is also argued that less de-regulation at the national level (negative integration) and more re-regulation at*

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the EU level (positive integration) does not necessarily lead to better protection and enforcement of Treaty-based and fundamental rights of individuals in the EU.

Keywords: EU health law, EU individual rights, EU internal market, free movement of persons, structural asymmetries

INTRODUCTION: THE STARTING POINTS

The health policy of the European Union (EU) has "clearly become strategically important" and has gained key significance for the EU since the pandemic hit five years ago.[1] According to the EU Commission, the principal EU achievements in countering COVID-19 can be summarised as parallel actions to safeguard the functioning of the Single Market and keep internal borders open; to prevent diseases and protect health through vaccines; to develop the European Health Union; and to help aid in recovery and stimulate post-pandemic re-investment.[2] The EU's pandemic response was firstly implemented through a soft-law and "coordinated approach" between the EU and its Member States (MSs), and then through a considerable amount of EU secondary laws, often allowing for harmonisation, and adopted at the EU level on the legal basis of the Single Market (Art. 114 of the Treaty of the Functioning of the European Union, TFEU), due to the limited EU competence for health pursuant to Art. 168 TFEU.[3] The EU's handling of the pandemic has also been presented by the Commission as a great success in light of the exceptional circumstances.[4]

However, the EU pandemic response also attracted a lot of substantive criticism.[5] The national-level travel restrictions fragmented the EU market and were a sign of processes re-nationalising the free movement of persons, and arguably caused discriminatory effects on a variety of vulnerable groups, while the EU focussed on

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[1] E. Kuiper, D. Brady, *EU Health Policy: From Reaction to Resilience*, European Policy Center, 12 February 2024, p. 1, available at: https://www.epc.eu/publication/EU-health-policy-From-reaction-to-resilience-57efb8/ (accessed 30 June 2025).

[2] *See Overcoming the COVID-19 Pandemic Together and Building a Health Union*, European Commission, 11 October 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_24_1389 (accessed 30 June 2025).

[3] *See e.g.* T.K. Hervey, S. Roettger-Wirtz, *The European Union: Legal Response to Covid-19*, in: J. King, O. Ferraz, P.A. Villarreal, A. Jones, A. Bogg, N. Countouris, E. Pils, N. Steytler, E. de Nicolis, B. Thomas, M. Veale, S. Suteu, C. Flood, C. Costello, N. Byrom (eds.), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford University Press, Oxford: 2021, pp. 1–91.

[4] European Commission, *The European Health Union: Acting Together for People's Health*, Brussels, 22 May 2024, COM(2024)206 final.

[5] *See e.g.* D. Thym, J. Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics*, 5(3) European Papers 1143 (2020).

"opening borders" through actions which may have themselves led to discriminatory impacts on various groups residing in the EU.[6]

Clearly, both the pandemic response and the follow-up actions meant a further expansion of EU regulation in the area of health protection, often achieved notwithstanding the limits of the wording of Art. 168 TFEU.[7] One may surely argue that those processes could have been expected because of the fact that "a silent revolution" of the EU powers being expanded through secondary health law (including public health and health care) had been long observed.[8] Others contend that the case law of the Court of Justice of the European Union (CJEU) related to the pandemic was "business as usual", and affirmed EU law orthodoxy more generally.[9] In that sense, the pandemic likely catalysed and illuminated previously obscured processes. Ultimately, the post-pandemic assessment of the EU's actions on border management, health and mobility vary.[10] The crisis had a destabilising effect, which prompts further inquiry into the nature and role of the case law and regulations, and their interpretation and application in specific fields.

One issue has definitely emerged: the relationship between protecting (public) health and the integrated market mobility of persons was a key dimension of the EU's response. The pandemic visibly challenged both the legal structures and the thinking about the free movement of persons in the EU (restrictions and border controls) and the regulatory integration in the field of health (European Health Union). At the same time, the coronavirus crisis triggered the development of regulatory frameworks and interpretations of the EU's free movement of persons,

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[6] *See e.g.* S. Robin-Olivier, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility*, 5(1) European Papers 613 (2020); G. Davies, *Does Evidence-based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures which Affect Free Movement*, 2 Frontiers in Human Dynamics 1 (2020); A. Alemanno, L. Bialasiewicz, *Certifying Health: The Unequal Legal Geographies of COVID-19 Certificates*, 12(2) European Journal of Risk Regulation 273 (2021).

[7] *See* C. Seitz, *The European Health Union and the Protection of Public Health in the European Union: Is the European Union Prepared for Future Cross-border Health Threats?*, 23 ERA Forum 543 (2023); *Editorial Comments: Charting Deeper and Wider Dimensions of (Free) Movement in EU Law*, 58(4) Common Market Law Review 969 (2021), pp. 974–984.

[8] A. de Ruijter, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*, Oxford University Press, Oxford: 2019.

[9] *See Editorial Comments: COVID in the Case Law of the CJEU: Affirming EU Law Orthodoxy Even under Extraordinary Circumstances*, 61(3) Common Market Law Review 581 (2024).

[10] *Cf.* V. Delhomme, T.K. Hervey, *The European Union's Response to the Covid-19 Crisis and (the Legitimacy of) the Union's Legal Order*, 41 Yearbook of European Law 48 (2023); T.K. Hervey, A. Fyfe, V. Delhomme, *Management of the European Union's (External and Internal) Borders during the Covid-19 Pandemic*, in: C.M. Flood, Y.Y.B. Chen, R. Deonandan, S. Halabi, S. Thériault, (eds.), *Pandemics, Public Health, and the Regulation of Borders: Lessons from COVID-19*, Routledge, London: 2024, pp. 65–78; T.K. Hervey, M. Michalak, *European Union Border Law During The Covid-19 Pandemic*, 62(3) Common Market Law Review 747 (2025).

border management and health law, which still merit further inquiry. An ampler appraisal of those developments could tell more, especially about their regulatory nature, the effects on individuals in the MSs and the relationship between the EU and national legal systems.

Against this background, this article explores the EU-level case law and secondary law at the health–mobility nexus which resulted (directly/indirectly) from the pandemic. It also inquires into the relationship between processes of negative integration through CJEU's judicial intervention and EU-level positive integration through regulation of the EU market in order to uncover possible distributive effects.[11] It asks what possible effects for individuals and their Treaty-based and fundamental rights can be observed, including socioeconomic effects.

One way of approaching those issues and to analyse EU case law and measures of secondary law is to refer to one of the prominent theories of European integration, that is, the conceptualisation of Fritz Scharpf's asymmetry thesis.[12] Scharpf argued *inter alia* that "integration through law" moved forward "through the seemingly inexorable evolution of judicial doctrines protecting and extending the treaty-based rights of private individuals"[13] and a parallel de-regulation of national market-correcting policies. He also claimed that the EU suffers from an inability to successfully re-regulate those policies through secondary law at the EU level, creating a structural "double asymmetry" between the processes of negative and positive integration and eventually leading to social and democratic deficits.

Those arguments were recently constructively critiqued by van den Brink, Dawson and Zglinski,[14] who argued that the thesis about structural/institutional asymmetry no longer adequately describes the reality and dynamics of the Single Market, and that the relationship between the negative and positive integration is now different. They suggested that the CJEU has recently been very deferential, leaving more room for national measures to potentially reconfigure the economic freedoms in its case law, while there has been growing evidence of the powerful EU

[11] *Cf.* B. Bennett, I. Freckelton, G. Wolf, *COVID-19, Law & Regulation; Rights, Freedoms, and Obligations in a Pandemic*, Oxford University Press, Oxford: 2023; V. Hooton, *Free Movement and Welfare Access in the European Union: Re-Balancing Conflicting Interests in Citizenship Jurisprudence*, Hart Publishing, Oxford: 2024.

[12] *See* F.W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40(4) Journal of Common Market Studies 645 (2002). *See also* F.W. Scharpf, *Governing Europe: Effective and Democratic?*, Oxford University Press, Oxford: 1999.

[13] F.W. Scharpf, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy*, Max Planck Institut für Gesellschaftsforschung, Köln: 2009, p. 13.

[14] M. van den Brink, M. Dawson, J. Zglinski, *Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU*, 32(1) Journal of European Public Policy 209 (2023).

social market regulation and "correction politics" at the EU level through legislative means and political processes.[15]

It is not the aim of this paper to directly challenge the above theories on the EU's political economy, but rather to investigate the case law and secondary law which arose from the pandemic in the fields of health and mobility (see Appendix 1 and 2 below) through the lens of those asymmetries.[16] In that sense the paper also responds to a call for more research to test the structural asymmetry arguments in sectoral policy areas, both in terms of case law and legislation.[17] The objective is thus to offer an informative and systematising value from the viewpoint of individual rights in the EU.

The article proceeds as follows: section 1 contains the explanation of the conceptual framework of the article; section 2 describes the research design and methods; sections 3 and 4 offer an analysis of the relevant EU case law and secondary laws pertinent to the field of the study. The final section concludes and Appendices 1 and 2 list the relevant judgments and legislation, respectively.

1. PRELIMINARY REMARKS ON THE CONCEPTUALISATION OF "ASYMMETRIES" IN RELATION TO HEALTH AND MOBILITY IN THE EU

The justification for employing and testing concepts of structural and substantive "asymmetries" in this text is the fact that the reaction to the pandemic from the EU and the MSs indeed triggered the adoption of a considerable number of EU-level, Treaty-based harmonisation measures (positive integration forming a politically declared European Health Union), notwithstanding the limited EU competence in health – which seems contrary to one of Scharpf's arguments on the structural asymmetry.[18] There are also some heralds of a parallel trend in the case law of the CJEU, that is, an arguably deferential approach to national public health measures regarding travel bans and restrictions on intra-European mobility.[19] Those findings might suggest that indeed the claims of van den Brink and his colleagues are

[15] *Ibidem*, pp. 221–26. *See also* J. Zglinski, *The End of Negative Market Integration: 60 Years of free Movement of Goods Litigation in the EU (1961–2020)*, 31(3) Journal of European Public Policy 633 (2023).

[16] *See* Scharpf, *supra* note 13, pp. 23–27; van den Brink, Dawson, Zglinski, *supra* note 14. *See also* B. Van Leeuwen, *Repositioning Free Movement of Services: A Substantive Perspective on the Structure and Dynamics of the Internal Market*, 62(3) Common Market Law Review 705 (2025).

[17] Scharpf, *supra* note 12, p. 18; van den Brink, Dawson, Zglinski, *supra* note 14, pp. 226–229.

[18] Scharpf, *supra* note 12, p. 19; *see also* de Ruijter, *supra* note 8, p. 183.

[19] P. Dąbrowska-Kłosińska, *The EU Court of Justice on Travel Bans and Border Controls: Deference, Securitisation and a Precautionary Approach to Fundamental Rights Limitations*, 50(1) European Law Review 107 (2025).

apt.[20] On the other hand, while they suggest that the EU's ability to achieve social objectives may be enhanced via positive integration and harmonisation (the EU's "market correcting policies"), they leave quite open the questions (and answers) of what the demise of the asymmetry thesis and the possible reversal of asymmetry between negative (toward less) and positive (toward more) integration actually mean for individuals and their rights at the national level (Treaty-based and fundamental rights, including socioeconomic ones).[21] If the CJEU is less interventionist than before, and the EU secondary regulation is growing, it will arguably impact those rights, including in the fields of EU health and mobility.[22]

It should also be noted that the EU health policy in relation to the free movement of persons *and* to the free movement of products in the Single Market has always been both relevant and intriguing for this conceptualisation. This is so for three reasons. Firstly, earlier CJEU jurisprudence on national public health policies afforded various degrees of discretion to both the EU and MSs in deciding on the acceptable *level* of risk and *methods* to achieve health protection, when necessary, in accordance with the principle of precaution.[23] Thus, it can be claimed that in the product-related case law, the "asymmetrical" impacts on the Single Market fluctuated: from usual market deregulatory effects of national measures in the field of risk regulation (e.g. food safety or GMOs), when the CJEU almost always treated national measures as unjustified obstacles to the EU market (negative integration),[24] to justifications of national-level policies on dangerous substances (e.g. anti-alcohol), which usually did not have the negative-integration deregulatory effects of the former case law.[25] Secondly, the viability of the original asymmetry thesis in the person-related case law in the context of health was also not decisive in the past: in 2010, the CJEU accepted broad national autonomy and measures based

[20] van den Brink, Dawson, Zglinski, *supra* note 14, pp. 226–229.

[21] *Ibidem*, p. 20. *Cf.* de Ruijter, *supra* note 8, pp. 178–179.

[22] *Cf.* Scharpf, *supra* note 12, p. 23. *See generally* L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014.

[23] *See* Case C-180/96 *United Kingdom v. Commission of the European Communities*, EU:C:1998:192; and Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, EU:C:2004:802.

[24] *See* Case C-333/08 *European Commission v. France*, EU:C:2010:44; Joint Cases C-439/05 and C-454/05 *Land Oberosterreich v. European Commission*, EU:C:2007:510. *See also* N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press, Oxford: 2020, ch. 3; P. Dąbrowska-Kłosińska, *Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union*, in: L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 192–208.

[25] Baumberg and Anderson argue that although "a partial juridification of alcohol policy has led to the negative integration of alcohol policies, this effect is not as strong as sometimes thought" – B. Baumberg, P. Anderson, *Health, Alcohol and EU Law: Understanding the Impact of European Single Market Law on Alcohol Policies*, 18(4) European Journal of Public Health 392 (2008).

on precautionary framing (albeit without naming it *expressis verbis*) in case of the freedom of movement of students under the TFEU and the Residence Directive[26] in *Bressol*.[27] It was justified on the basis of protecting the future labour force in the national health care system in Belgium (economic grounds). This judgment constitutes a counterexample to a similar case described by Scharpf and decided five years earlier (2005), which enforced access to the Austrian universities of German medical students.[28] Furthemore, in *Leger* the CJEU's standard of review regarding evidence base and the proportionality analysis of national law[29] was very similar to that in the judgment in *Scotch Whisky*,[30] which van den Brink and others consider to be proof that the asymmetry thesis is outdated.[31] Thirdly, the construct of power-sharing between the EU and MSs in Art. 168 TFEU (Title XIV Public Health), at least in the version of the Treaty of Lisbon, both allows and prohibits harmonisation of certain person-related and product-related fields, which in turn either enables or discourages the political and institutional feasibility of harmonisation at the EU level.

2. RESEARCH DESIGN: CASE SELECTION AND METHODS

The choice of scope of this article (health protection and mobility of persons in the Single Market during the COVID-19 pandemic) was also prompted by the fact that similar policy fields (mobility and health) had been of interest to scholars exploring asymmetries in the past, including the deregulation of national social policy measures and the impossibility of a parallel re-regulation at the EU level.[32] It makes the research design of health and mobility field (a sector which crosscuts

[26] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77 (Residence Directive).

[27] *See* the risk and uncertainty analysis as a justification to a measure of *numerus clausus* concerning the free movement of students between Belgium and France in: Case C-73/08 *Bressol v. Gouvernement de la Communaute Francaise*, EU:C:2010:181.

[28] Case C-147/03 *Commission v. Austria*, EU:C:2005:427; *see* Scharpf, *supra* note 13, pp. 14–15.

[29] Case C-528/13 *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, EU:C:2015:288.

[30] Case C-333/14 *Scotch Whisky Association and Others v. The Lord Advocate and The Advocate General for Scotland*, EU:C:2015:845.

[31] *Cf.* van den Brink, Dawson, Zglinski, *supra* note 14, p. 220–221.

[32] For the classic Scharpf thesis, *see* Scharpf, *supra* note 13, pp. 18–19, 28–29; *cf.* van den Brink, Dawson, Zglinski, *supra* note 14, pp. 220, 223. *See also* O. Gerstenberg, *The Justiciability of Socio-economic Rights, European Solidarity, and the Role of the Court of Justice of the EU*, 33(1) Yearbook of European Law 245 (2014) who refers also to health-related arguments.

the Single Market and the Health Policy) a most likely case to investigate and test for both viewpoints.[33]

The research was designed to examine both potential structural (institutional) asymmetries – negative and positive integration – and possible substantive asymmetries regarding the impact on the rights and interests of individual actors at the national level in the field of EU health protection and free movement of persons as affected by the COVID-19 pandemic.[34] The research scope was delineated by the subject matter: health protection in the EU in the context of COVID-19 measures (e.g. quarantines, online schooling and restrictions on movement) and the exercise of the freedom of movement of persons (individuals and entities) within the EU.

The article employs a relatively broad understanding of both mobility and health: "health" includes both public health and health care, in line with the general approach of many scholars.[35] The broad sense of the notion of "mobility" reflects the broad scope of application of the free movement of persons in the EU.[36] The material scope of research was thus based on qualitative, theoretically informed criteria[37] and the temporal scope was based on quantitative criteria related to either the CJEU's legal proceedings or EU-level legislative initiatives (2020–2022, when the pandemic was the most severe).

The methodology applied in the article follows a traditional doctrinal and empirical legal approach, which is applied to the analysis. The initial search results of judgments and secondary law were gathered from publicly available EU institutional databases.[38]

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[33] *Cf.* K. Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109(3) American Journal of International Law 475 (2015).

[34] *Cf.* R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53(1) American Journal of Comparative Law 125 (2005).

[35] *See* T.Hervey, J.V. McHale, *European Union Health Law*, Cambridge University Press, Cambridge: 2015; T.K. Hervey, *Telling Stories about European Union Health Law: The Emergence of a New Field of Law*, 15(3) Comparative European Politics 352 (2017); *but see* de Ruijter, who treats public health and health care as largely separate (de Ruijter, *supra* note 8). *See also* W.E. Parmet, M. Frischhut, A. Garde, B. Toebes, *Introduction to Public Health Law*, in: D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2021, pp. 68–76.

[36] *Cf.* P. Dąbrowska-Kłosińska, *The Right to Family Reunion vs Integration Conditions for Third-Country Nationals: The CJEU's Approach and the Road Not Taken*, 20(3) European Journal of Migration and Law 251 (2018).

[37] *See generally* K. Linos, M. Carlson, *Qualitative Methods for Law Review Writing*, 84(1) University of Chicago Law Review 213 (2017).

[38] The judgments of the Court of Justice of the EU were searched in the CURIA database (www.curia.europa.eu), and the EU secondary laws were searched in the European Parliament Legislative Observatory database (https://oeil.secure.europarl.europa.eu).

2.1. Description of case law selection

The initial search of the CJEU database using the keyword "COVID" returned almost 650 documents, a considerable majority of which related to competition law and state aid. For this reason, the search criteria were narrowed in accordance with the subject matter of the research design, and the competition law cases were excluded.[39]

The actual search of the relevant case law was thus conducted using "COVID" as the principal search keyword in the text of documents and specific, predetermined criteria relevant to the material and temporal scope of the research. Those criteria were chosen by ticking the relevant boxes in the search form: (i) documents (all available documents, including national decisions and excluding summaries for the purpose of economical research); (ii) subject matter ("Internal Market – Principles", "Right of entry and residence", "Public health", "Free movement of workers", "Area of freedom, security and justice", "Fundamental rights", "Data protection", "Citizenship of the Union" and "non-discrimination"); (iii) timeframe (from 1 January 2020 to 31 December 2022); and (iv) publication (both completed cases and those in progress).

The search returned 128 documents, sometimes with repeated entries (79), which were checked for relevance to the research subject, and then analysed in detail (see section 3 and Appendix 1).[40] The cases declared inadmissible were also considered (see section 4.2 and Appendix 1).[41] The results were cross-checked against CJEU press releases and the additional search of two specific acts of secondary law regarding the cross-border movement of patients – the Cross-border Healthcare Directive and the Social Security Regulation[42] – to make sure that no important cases were omitted.

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[39] The latter would merit a separate analysis which would exceed the scope of this text due to the cases' number, complexity and lack of direct relevance to this study (although the aviation sector might be considered to belong to a broadly defined mobility).

[40] The cases which were omitted from the detailed description (section 4.1.) concern the functioning of the judicial system, access to EU institutions, product-related scientific evidence and insurance services (*see* Appendix 1).

[41] *Cf. Editorial Comments...*, *supra* note 9, pp. 583–585, where COVID-19 inadmissible case law is easily dismissed as a purely procedural matter.

[42] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45; Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1. No pandemic-related cases were decided under those two acts in relation to cross-border health care during the study period.

2.2. Description of secondary law selection

A search of secondary law relevant to the research was also done using the keyword "COVID" in the text of documents (as an exact word/phrase) for the selected timeframe (legislative initiatives between 2020 and 2022). The first search of the European Parliament database concerned all types of legislative acts in the co-decision procedure (the ordinary legislative procedure ticked in the boxes of the search form). The search returned a total of 96 files, which was too many to feasibly analyse for this text.[43] In order to narrow down the number of results, criteria were introduced to select Directorates General in the European Commission usually leading files (so-called *chef the file*) relevant to the subject of the research: (i) "Justice and Consumers" (seven files); (ii) "Health and Safety" (nine files); and (iii) "Migration and Home Affairs" (six files). The search returned 22 legislative files in total, which are listed in Appendix 2. An additional search was conducted with the keyword "Health Union" in order to cross-check that no key files were omitted.

3. THE ANALYSIS OF CJEU JUDICIAL REVIEW: TRAVEL BANS, PUBLIC GATHERINGS, SOCIAL BENEFITS, HEALTH DATA AND INTERNATIONAL PROTECTION OF MIGRANTS

Before turning to the analysis of the specific findings on the CJEU case law under investigation, a few preliminary remarks are needed. Firstly, the number of requests for preliminary rulings and claims filed with the CJEU and the resulting number of judgments on the subject at hand appeared to be relatively small, especially given the catastrophic nature of the pandemic and the hundreds of judicial proceedings (civil, administrative and constitutional) at the national level in many MSs.[44] The relatively few EU-level judgments and interpretations partly confirms the findings of van den Brink and his colleagues about the decreasing trend of Single Market case law (in terms of quantity)[45] and the observation that the pandemic was quite oddly absent from CJEU jurisprudence in general (in terms of quality).[46]

Secondly, the research for this article returned a large number of cases where EU-level secondary laws (positive integration) were contested, but rendered in-

[43] Forty-nine legislative files for the year 2020, twenty-three for the year 2021 and twenty-four in 2022.

[44] *See e.g.* L. Vyhnánek, A. Blechová, M. Batrla, J. Míšek, *The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations*, 25(4) German Law Journal 386 (2024); A. Golia, L. Hering, C. Moser, T. Sparks, *Constitutions and Contagion: European Constitutional Systems and The Covid-19 Pandemic*, Max Planc Institute, Munich: 2020; P. Dąbrowska-Kłosińska, *The Protection of Human Rights in Pandemics – Reflections on the Past, Present, and Future*, 22(6) German Law Journal 1028 (2021). *Cf.* J. Mulder, *Editorial*, 22(6) German Law Journal 1 (2021).

[45] *Cf.* van den Brink, Dawson, Zglinski, *supra* note 14, p. 220.

[46] *Cf. Editorial Comments...*, *supra* note 9, p. 586.

admissible; interestingly, however, no cases of any type of proceedings concerned an interpretation of the Cross-border Healthcare Directive and Social Security Regulation (see section 4.3).

Thirdly, a great many COVID-19-related cases before European Courts regarded state aid and the air transport sector.[47] During the pandemic, a significant number of state aid decisions issued by the Commission accepted the aid granted by MSs to aviation companies. Most, if not all, of those cases were referred to the General Court – and later appealed to the Court of Justice – by some competitors on grounds of discrimination and claims that the states had favoured national airlines.[48] It is beyond the scope of this article, but it would be interesting to examine this jurisprudence more comprehensively in the context of the asymmetry thesis and establish whether the CJEU upheld state aid interventions through a deferential application of EU competition rules, with the resulting social effects for the regulation of national markets, public services/companies and economic rights.[49] In any case, the number of such proceedings confirms that during the pandemic a lot of public funding was redirected to private corporations as aid measures (often for political reasons).[50]

Finally, the cases identified in the research, where judgments were actually rendered by the CJEU, can be divided into various groups, concerning restrictions of movement, public gatherings and COVID-19 mobile apps, social benefits, protection of data privacy and protection of migrants' rights. Considered from the perspectives of the CJEU's review, national autonomy, positive/negative integration and the resulting consequences for individuals, these cases prompted the observations presented in the next section.

3.1. The outcomes of CJEU judicial review: Interventionism or deference?

It is now time to turn to a more detailed analysis of the case law under study (see also Appendix 1). Consider the two cases which concerned restrictions of movement (travel bans, compulsory testing/quarantines and limits on public gatherings).[51] In

[47] As a matter of principle, state aid is prohibited under EU law and Art. 107(1) TFEU if it distorts competition, save for three exceptions under para. 2 of that article. One of those exceptions under Art. 107(3)(b) TFEU regards state aid to compensate for damages caused by natural disasters or exceptional occurrences, which is considered to be compatible with the Single Market.

[48] *See e.g.* Case T-657/20 *Ryanair DAC v. European Commission*, EU:T:2022:390; *see also Editorial Comments...*, *supra* note 9, p. 586–587.

[49] *Cf.* the importance of competition law for the asymmetry as explained by Scharpf, *supra* note 13, pp. 7–8.

[50] *Cf.* M. Scheinin, H. Molbæk-Steensig, *Human Rights-based versus Populist Responses to the Pandemic*, in: M. Kjaerum, M.F. Davis, A. Lyons (eds.), *COVID-19 and Human Rights*, Routledge, London: 2021, p. 30.

[51] Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951; C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.

the *Nordic Info* case – which was a private tort action against Belgium for damages caused by an alleged mis-management of the pandemic – the CJEU interpreted the compatibility of national law, which restricted non-essential travel and required compulsory tests, screening and quarantines on the grounds of protecting public health, with the provisions of secondary law regulating the right to move freely in the EU, through a very deferential review.[52] The Court granted broad powers – viewed by some authors as a *carte blanche*[53] approach – to national public health authorities and to the decision of the referring court. The latter was tasked with assessing the proportionality of measures through detailed guidelines elaborated by the Court. In principle, the domestic provisions were deemed compatible with the EU legal framework as a proportionate exception to the free movement of persons in the interest of protecting public health during the COVID-19 pandemic and on the principle of general interest, which can justify human rights limitations (of Arts 7, 16 and 45 of the EU Charter; Art. 3(2) TEU; Arts 20 and 21 TFEU; and Directive 2004/38).[54] From the perspective of protecting individual, fundamental rights in EU, the CJEU conditioned the legality of national law on procedural safeguards enshrined in Directive 2004/38 (the principle of legal certainty, the principle of good administration and the right to an effective judicial remedy), respect for the relevant fundamental rights and principles of the EU Charter, the prohibition against discrimination and the principle of proportionality. Yet, it also incorporated the precautionary principle in its assessment of the proportionality of those rights' limitations, and further, it included the functioning of the national health care system in the conditions of the proportionality assessment, which may eventually render the protection of fundamental rights less effective.[55] Additionally, the standard of scientific evidence was lower in this case than in earlier jurisprudence. The direct result of this case for the applicant was a limitation of the company's Treaty-based freedom and a likely lack of entitlement to damages. In light of the judgment, the national law issued to counter the pandemic was considered a proportionate ex-

[52] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

[53] D.F. Povse, *So Long and See You in the Next Pandemic? The Court's One-and-done Approach on Permissible Reasons to Restrict Freedom of Movement for Public Health Reasons in the Nordic Info Case (C-128/22) of 5 December 2023*, European Law Blog, 19 December 2023, available at: https://tinyurl.com/yc2f39xp (accessed 30 June 2025).

[54] Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951, paras. 93–98.

[55] For a critical account, *see* Dąbrowska-Kłosińska, *supra* note 19.

ception to EU market integration and a part of social regulation on the national territory (which aimed to protect public health).[56]

Consider the next case, which concerned the compatibility of national law restricting access to public spaces and gatherings during the pandemic – by requiring verification via a digital mobile application that the individual is "infection free" – with the General Data Protection Regulation (GDPR). The dispute arose in another small EU MS: Czechia.[57] The applicant claimed that the fact that the mobile application gave all personnel access to a variety of personal health data beyond the green mark on the screen (which was to prove compliance with the EU Covid Digital Certificate and the national health law requirements) constituted an infringement of the right to privacy and the GDPR.[58] In the answers to preliminary questions, the CJEU stated that the verification done via the mobile application constituted personal data processing,[59] but left it for the referring court to "ascertain whether the processing introduced by the extraordinary measure, first, observes the principles relating to the processing of data laid down in Article 5 of the GDPR and, second, observes one of the principles relating to the lawfulness of processing laid down in Article 6 of that regulation."[60] As a result, the CJEU carried out a moderately strict review of national measures, suggesting that they were incompatible with secondary law constituting complete harmonisation of the GDPR. Yet, it was left to the national court to determine specific infringements.[61] Indeed, following the CJEU judgment, the national court conducted a strict review of the national public health measure regarding the COVID-19 mobile app and decided in favour of the plaintiff, stating that the contested national measure had infringed the individual's right to privacy and right to data protection.[62]

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[56] *Cf.* Case C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951, para. 98. *See also* Case C-73/08 *Bressol v. Gouvernement de la Communaute Francaise*, EU:C:2010:181. It should be noted that specific distributive effects in that type of cases are difficult to establish and dispersed – the private applicant might have received some state aid instead of compensation, but it is difficult to quantify costs for individuals in the Nordic states and other categories of individuals in the EU who might have wanted to travel with Nordic Info, but could not.

[57] Case C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.

[58] *Ibidem*, paras. 16–20.

[59] *Ibidem*, para. 30; *see also* para. 16: "The application scans the QR code of the certificate using the camera of the mobile telephone of the person conducting the check. That person then has a preview of the basic identifying data of the certificate holder (surname, first name and date of birth) as well as the status (valid or invalid) of the certificate. By clicking on a specific button of the application, the person conducting the check is able to access the complete set of the information shown in the certificate, such as vaccination, type of vaccine, vaccine manufacturer, number of doses received, date of vaccination, date of first positive result and certificate issuer."

[60] *Ibidem*, para. 32.

[61] *Ibidem*, paras. 31–32.

[62] The national court decided that the applicant did not have standing for part of the action – *see* Supreme Administrative Court in Czech, judgment of 30 November 2023, 8 Ao 7/2022-132, paras 16, 31–32, 37, 64, 75–79 and 84–85.

Another pair of cases concerned labour law and social security rights, a national public health quarantine order and individuals' right to annual leave. In the *Sparkasse Südpfalz* case, a person employed in Germany claimed that an annual paid leave which had been consumed by the quarantine order imposed by a national health authority should be moved to the next year, so that the person could use it appropriately.[63] The core of the dispute related to the compatibility of national law and labour courts' previous practice (case law) with the provisions and standards of the Working Time Directive and Art. 31(2) of the Charter (the right to an annual period of paid leave).[64] The German courts have repeatedly ruled that the German law requires employers to carry over days of leave when workers demonstrate a real incapacity for work, but it was not applicable during the pandemic in cases of a quarantine, which does not amount to an incapacity to work.[65] In the judgment, which contains a very surprising turning point in the judicial interpretation, the CJEU held that the purpose of a quarantine was different from that of sick leave, and that in consequence a period of quarantine "cannot, in itself, present an obstacle to the attainment of the purpose of paid annual leave, which is intended to enable workers to rest from carrying out the work [...] and to enjoy a period of relaxation and leisure."[66] As a result, "national legislation and practice which does not allow days of paid annual leave granted to a worker who is not sick to be carried forward for a period which coincides with a period of quarantine ordered by a public authority due to that worker's contact with a person infected with the virus" was found to be compatible with EU law.[67]

The CJEU exercised a deferential review of the national law in the case (while adjudicating on a public health measure and national labour law), but ultimately, the interpretation on the compatibility of national measures and practice with the Working Time Directive and the Charter did not work in the interest of the individual. A careful reading of the CJEU judgment reveals that it likely did not want to counter the practice of the German labour courts (and state policy) during the pandemic. Nonetheless, the interpretation of the CJEU that equated a period of quarantine with paid annual leave (when one could, for example, travel or spend time in nature), which eventually would not be allowed to be carried over to the next year, was very odd.

In another case – *Thermahotel Fontana* – the Court performed a typically intensive review of a national law and declared that provisions refusing compensation to

[63] Case C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384.

[64] Art. 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

[65] C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384, para. 12.

[66] *Ibidem*, para. 43.

[67] *Ibidem*, para. 45.

frontier workers from other MSs in case of COVID-19 isolation in that MS were incompatible with the rights of those workers from the Treaty and EU secondary law.[68] The CJEU held that Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.[69]

Evidently, the Court decided in favour of cross-border workers prioritising the principle of non-discrimination and negative market integration over the overreach of the national (Austrian) system of social security. The Court also held – contrary to the argument of the Austrian government – that the concern about the financial costs of compensation granted to workers isolating themselves in other MSs due to COVID-19 infection does not justify limiting the free movement of persons (economic concerns).[70] The Court further stated that "although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers", and noted that "to avoid the unjust enrichment of migrant workers who are also compensated by their Member State of residence for the isolation imposed by the competent authorities of that State" it is sufficient that the Austrian authorities take account of compensation already paid or due under the legislation of another MS, where appropriate by reducing the amount thereof, so as to avoid overcompensation.[71] As a result, the CJEU ruling created specific distributive effects: it protected the Treaty-based and social security rights of frontier workers from other MSs while making the compensation system in Austria responsible for financial and administrative costs.[72]

The next group of cases concerned data protection in the context of pandemic measures restricting the free movement of persons in order to protect health.[73] In a German case about the right to privacy and the protection of teachers' data in the context of online schooling, the CJEU issued a seminal judgment on the compatibility of national law with Art. 88 GDPR, which was widely discussed.[74]

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[68] Case C-411/22 *Thermalhotel Fontana*, EU:C:2023:490, paras. 31–48.

[69] *Ibidem*, para. 48.

[70] *Ibidem*, paras. 44–45.

[71] *Ibidem*, paras 46–47.

[72] *Cf.* Scharpf's explanation of the Austrian universities case – Scharp, *supra* note 13, p. 14.

[73] Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270; Case C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231. *See also* Case C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949.

[74] *Cf.* C. Galichet, *Règles complémentaires au RGPD en matière de traitement de données à caractère personnel dans les relations de travail*, 11 Dalloz IP / IT 597 (2023); H.H. Abraha, *Hauptpersonalrat der*

The CJEU decided that the processing of teachers' personal data during the live-streamed videoconferences of the public education classes they were teaching falls under the material and personal scope of Art. 88, which grants a broad margin of discretion to MSs wishing to adopt "more specific rules" (an opening clause) to ensure protection of the rights and freedoms regarding the processing of employees' personal data.[75] This discretion is qualified by the wording of that provision which – especially in paragraph 2 – reflects the limits of differentiation allowed by the GDPR, because it sets conditions which national regulations must respect (if they are to qualify as such rules). That is,

> those more specific rules must seek to protect employees' rights and freedoms in respect of the processing of their personal data in the employment context and include suitable and specific measures to protect the data subjects' human dignity, legitimate interests and fundamental rights. Particular regard must be had to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity, and monitoring systems at the workplace.[76]

As a result, a mere repetition of the requirement of the EU data protection rules is not sufficient for national rules to be compliant with Art. 88.

The outcome of the ruling had a clear bearing on the national dispute which arose between a teacher's organisation and the Culture Ministry in the Land of Hessen. The representatives of the organisation claimed that the legal and organisational framework for school education during the COVID-19 pandemic, which made it possible for pupils who could not be present in a classroom to attend classes live by videoconference, did not provide for the teachers concerned to give consent to participate in that service, although respective provisions did call for the consent of the pupils themselves or, for those pupils who were minors, of their parents.[77] In answer to the preliminary questions, the Court held that the national rules were not compatible with the EU secondary law and the protection of fundamental rights of individuals (the teachers) – subject to a final verification by the referring court.[78] In the words of the Advocate General, the national rules did not appear to have adequate normative content, which demonstrates a typical strict scrutiny review by

Lehrerinnen: Article 88 GDPR and the Interplay between EU and Member State Employee Data Protection Rules, 87(2) The Modern Law Review 484 (2024); S. Glaser, *Zoomed Out Teachers: The Covid-19 Pandemic, Data Processing in the Context of Employment and the Social Contract in Hauptpersonalrat der Lehrerinnen und Lehrer*, 61(4) Common Market Law Review 1103 (2024).

[75] Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270, paras. 51–52.

[76] *Ibidem*, paras. 73–74.

[77] *Ibidem*, paras. 14–15.

[78] *Ibidem*, paras. 78–81.

the Court (para. 81). The result of that answer was the obligation for the national court to disregard the national law in accordance with the principle of primacy of EU law, which renders any conflicting provision of national law automatically inapplicable.[79] However, the CJEU also obliged the national court to check whether the national provisions in question satisfied the requirements for the grounds of public interest regarding the lawfulness of processing under the GDPR (Art. 6.3, with connection to Art.6.1e). If the processing of teachers' personal data could be classified as performing a task in the public interest (protecting health during the pandemic), they must not be disregarded.[80] In such a case the national law is valid and individual rights are considered to be limited, the lawfulness and proportionality of which is assessed by the referring court. The court also ultimately exercises the choice of the two possible pathways of interpreting and applying national law offered by the CJEU.

Consider also the case of *L.H.*, in which access to public documents was requested in order to obtain information concerning identification of persons who had signed contracts with the Czech Ministry of Health for the purchase of COVID-19 screening tests, as well as the certificates demonstrating that those tests may be used on the territory of the EU.[81] The national authority refused to release personal data because the relevant national data protection law required the prior consent of the person in question, and this was too difficult in the case of personnel/representatives of legal persons with a seat outside the EU (e.g. in China). The applicant brought legal proceedings against the decision. In response to the national court, the CJEU quite broadly construed the understanding of the duty of a national public authority (a data controller) to inform and consult natural persons prior to the disclosure of official documents containing their personal data, reconciling the individual right to access public information (Art. 1 and 10 TEU and Art. 15 TFUE) with the right to protection of personal data and privacy (Art. 8 of the Charter and Art. 16 TFEU).[82] It was done contrary to the suggestion of the national court, which deemed the scope of the duty too burdensome vis-à-vis the right to access information.[83] The CJEU accepted national autonomy to define specific conditions for the implementation of the GDPR, but emphasised that the practical consequences,

[79] *Ibidem*, paras. 82–83.

[80] *Ibidem*, para. 88: "[W]here the referring court finds that the national provisions on the processing of personal data in the employment context do not comply with the conditions and limits laid down in Article 88(1) and (2) of the GDPR, it must still verify whether those provisions constitute a legal basis referred to in Article 6(3) of that regulation, read in conjunction with recital 45, which complies with the requirements laid down in that regulation. If that is the case, the national provisions must not be disregarded."

[81] Case C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231.

[82] *Ibidem*, paras. 32–48.

[83] *Ibidem*, paras. 16, 39–43.

of an organisational, economic and medical nature in particular, arising from the additional requirements could not be so excessive as to render the right to access information ineffective.[84] The Court ruled that "it is common ground that that law requires public authorities to disclose information, including official documents, to the persons who so request."[85] Thus, in the ruling the CJEU both left broad discretion to national law and earlier case law and ensured rather generously – for the referring court to verify – that the scope and boundaries of the right to access information at the national level were not disproportionately narrow.[86]

One more pair of cases concerned the international protection of migrants and the suspension of transfers of asylum seekers between MSs during the pandemic (from Germany to Italy, where the persons had entered the EU, in line with the EU migration law system, the so-called Dublin system).[87] According to the case, the German authorities adopted administrative suspension decisions in 20,000 cases, and legal proceedings before the court were pending in over 9,300 cases.[88] The legal issues in those cases concerned procedural safeguards (time limits for a maximum of six months when transfer can take place between states) and judicial remedies opposing transfer decisions taken against persons seeking international protection. The CJEU decided on a broad construction of the rights of those asylum-seekers' rights in international protection versus the MS's procedural autonomy. As a result, the national proceedings were discontinued in favour of the applicants because of the withdrawals of the state.[89]

[84] *Ibidem*, paras. 39–42, 45–46.

[85] *Ibidem*, para. 42.

[86] *Ibidem*, para. 46: "an absolute application of that obligation [to inform a person concerned whose personal data are to be disclosed] could give rise to a disproportionate restriction on public access to official documents. It is conceivable that, for various reasons, informing and/or consulting the data subject may prove impossible or would require disproportionate effort. In such a context, invoking the impossibility, in practice, of informing and consulting that data subject in order to justify the systematic refusal of any disclosure of information concerning that person would lead to the exclusion of any attempt to reconcile the interests involved, even though such reconciliation is expressly prescribed for in Article 86 of the GDPR."

[87] Joined Cases C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709. *See also* Case C-823/21 *Commission v. Hungary*, EU:C:2023:504; Case C-123/22 *Commission v. Hungary* EU:C:2024:493; and Case C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

[88] Joined Cases C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709, para. 30.

[89] BVerwG, Order of the Senate of the Federal Administrative Court of 14 August 2020 – 2 K 232/20.A; BVerwG, judgment of the Senate of the Federal Administrative Court of 10 June 2020 – 9 K 2584/19.A. *See also Editorial Comments...*, *supra* note 9, pp. 587–88; H. Zaruchas, *Challenging Dublin Transfers: Revisiting Judicial Developments in Light of the New Asylum and Migration Management Regulation: CZA and X v. Staatssecretaris*, 62(1) Common Market Law Review 237 (2025).

3.2. Impacts on the rights of individuals and the role of national courts

Before proceeding to the next section and examining the EU secondary law which can tell more about positive integration at the intersection of health and the movement of persons, as well as the dynamics of the Single Market, this summary presents some interim observations concerning the CJEU's jurisprudence. Firstly, from the perspective of either the original "asymmetry thesis" or its critique, the judgments reveal a mix of approaches and a complex reality of judicial interpretation in a multi-level polity under the pressure of the pandemic. There is a tendency towards a generally less interventionist review of national regulatory measures for social objectives (public health and data protection), a broad construction of exceptions to restrictions of movement (e.g. in *Nordic Info* or *Sparkasse Südpfaltz*) and much deference to national courts' discretion. In such cases, there is little chance for individuals to enforce their Treaty-based claims (e.g. seek compensation for national authorities' conduct) when there is a priority of national social protection of public health.

Still, there is also an indication of the sometimes very diverse approaches of the CJEU. Compare for example the decisions in *TF v. Sparkasse Südpfaltz* with the judgment in *Thermalhotel Fontana*: in the former, the CJEU performed a deferential review towards national practice and the national court's decision, leaving much room for the national court regarding individual labour rights (resulting in their disregard towards the welfare policy of enforcing quarantines at no excessive cost for employers, but for employees); the latter is a typical negative integration ruling (in the Scharpfian sense), where national law must obey the Treaty-based freedoms and avoid discrimination for the purposes of market integration, equality and social security benefits for frontier workers of other MSs, with all the socioeconomic distributive consequences.

Secondly, the majority of cases concerned the interpretation of secondary law previously adopted at the EU level in the form of positive integration (data protection, working time and asylum). In cases where there is EU positive integration law, the intervention of the CJEU often took the form of a stricter review, including the enforcement of fundamental rights guarantees of data subjects (privacy and data protection), migrants (right to asylum and effective judicial remedy) and individual citizens (right to access information). However, rather typically, this largely leaves it for the national courts to decide on the final outcome of the proceedings (e.g. *Application Mobile COVID-19*, *On-line Teaching*, *Sparkasse Südpfalz*, *M.A.*, *P.B.*, *L.E.* or *L.H.*). This can lead to different effects for individuals depending on the national judicial/administrative practice and state policy. For example, in some cases the national court decisions implemented a strict review of national-level law *vis-à-vis* fundamental rights following the CJEU decisions (*Application Mobile*

COVID-19; see also *M.A.*, *P.B.* and *L.E.*), but that may not always be the case (cf. *On-line Teaching* or *Sparkasse Südpfalz*) depending on subtle differences within national-level implementation of EU standards.[90] This also changes the dynamic of the EU market integration because national (welfare state) laws and practices interplay with EU regulatory acts, and although both aim to fulfil the same social objectives, some values (at the national level) are objectively different.[91] The amount of case law is also lower generally. Those latter statements at least partly confirm the claims presented by van den Brink and his colleagues.[92]

Thirdly, a national court is sometimes really empowered to decide on the model of integration: either a strict review of national market-correcting policy (data protection) and more protection for fundamental and EU-law-based rights or laxity of review and deference to national policy at the cost of less protection for individuals (*On-line Teaching*).[93] In other words, in *On-line Teaching* (see also *Nordic Info BV*, *Application Mobile Covid-19* and *Thermalhotel Fontana*), the CJEU left the national court with a choice of interpreting, verifying and applying the model of integration (and possible asymmetry) to be implemented: either negative integration, where national laws are disapplied and individuals can rely on the EU-level laws (both primary and secondary) to enforce their fundamental rights and pursue their interests, but MSs' autonomy and powers to implement national market-correcting policy are limited, or differentiated/neutral integration, where MSs pursue different levels of protection through specific policies in the shadow of EU-level secondary law. In the latter case, individuals are offered a national-level protection of fundamental rights to a varying degree, but states pursue their national policies (e.g. protection of public health). To give one more pre-pandemic example, in the 2015 *Leger* judgment, the CJEU engaged directly in reviewing epidemiological data and medical knowledge about the disease AIDS to decide on discrimination, but ultimately left the national court to decide the outcome of the case.[94]

Fourthly, the legal effects for individuals vary. A more restrictive review of the CJEU usually means the possibility of enforcing the claims based on the Treaties and EU secondary law, including the protection of fundamental rights against the state. This constitutes a clear benefit for EU integration of mobile individuals in terms of socioeconomic (distributive) effects, but at the cost of possibly weaker

[90] It is possible that those national social standards in some states were lowered in the process of integration, which would prove the asymmetry thesis at some point, or because of the pandemic.

[91] *See also* de Ruijter, *supra* note 8.

[92] *See* van den Brink, Dawson, Zglinski, *supra* note 14.

[93] *Cf.* Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer*, EU:C:2023:270.

[94] *See* M. Frischhut, *Communicable and Other Infectious Diseases: The EU Perspective*, in: D. Orentlicher, T.K. Hervey (eds.), *The Oxford Handbook of Comparative Health Law*, Oxford University Press, Oxford: 2020, pp. 77–96; Case C-528/13 *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, EU:C:2015:288.

state welfare policies and varying degrees of protection of fundamental rights (e.g. political vs social rights in different states). On the other hand, the CJEU's deference leaves the protection of fundamental rights to national courts and may lead to more uncertain outcomes in terms of enforcing protection and distributive effects for individuals unless EU-level regulatory acts and policies are applied directly, uniformly and generally to substitute national policies and agree on common objectives (see *L.H.*, *M.A.*, *P.B.* and *L.E.*). By saying that, I mean that the very fact of adopting a large number of positive integration measures (as claimed by van den Brink and his colleagues) indicates a change in the market dynamics, but tells little about how those acts pursue adequate market-correcting policies at the national level, replace or complement welfare state polices and work responsively towards the interests of individuals.

Before turning to positive integration in the next section, one more comment is due. The case law on the subject has arguably been relatively limited because of the fact that many cases are declared inadmissible (see also section 4.3) and the CJEU is unwilling to loosen its interpretation of the procedural rules of legal standing under Art. 263(4) TFEU. At the same time, there is a gap between the alleged impossibility of individuals filing direct claims to the Court and an arguable stretching of the limits of EU competence when adopting EU regulatory acts (positive integration) at the intersection of mobility and health. The only way for individuals to reach the Court was via the preliminary ruling procedure, which – for understudied reasons that surely go beyond the scope of this work – favoured states from Northern Europe in terms of legal geography (Germany, Belgium, Latvia, Czechia and Austria).[95] On the other hand, the 18 cases which were declared inadmissible (both direct and indirect actions to the Court) all came from Italy, France and Spain (see also section 4.3).

4. THE ANALYSIS OF EU SECONDARY LAW: FROM THE REGULATION ON EU COVID DIGITAL CERTIFICATE TO THE REGULATION ON EUROPEAN HEALTH DATA SPACE

It is now time to move to the examination of the EU secondary law which was identified through the research selection (see section 2.2). Certainly, a detailed analysis of the substantive content of each act and its provisions would not be possible in one research article. Instead, this section offers an analysis of those aspects of EU-level regulation which can lead to a better understanding of the implications for rights of individuals in the EU stemming from the positive integration (re-regulation)

[95] F. De Witte, *Here Be Dragons: Legal Geography and EU Law*, 1(1) European Law Open 113 (2022), p. 115.

of policies pertinent to health protection and movement of persons. Accordingly, section 4.1 investigates the features of EU regulatory acts and section 4.2 considers the potential of re-regulating social market objectives at the EU level.

4.1. Features of EU-level regulatory measures

The research conducted for this article revealed that the EU was willing and politically capable of addressing various aspects of health protection and free movement of persons through positive integration measures. The regulatory acts (16 secondary laws) initiated and adopted (most of them) during the study period (2020–22) can be divided into three groups according to their subject matter: (i) five acts directly related to health protection and movement of persons; (ii) six acts related to institutional developments; and (iii) seven acts indirectly related to health protection and movement of persons.

The first factor which is plainly visible in the analysis of those acts of EU-level secondary law, whose adoption was triggered by the COVID-19 pandemic, is that a large number of them take the form of regulations (75%), which may correspond with a general EU trend in legislation. Furthermore, with regard to the legal form, one can observe the conversion of decisions/directives into regulations (e.g. the Cross-border Health Threats Regulation), which means increasing unification of national laws through positive integration: all regulations contain general, directly applicable and – usually – directly enforceable EU law provisions which co-exist with the domestic legal order in all EU MSs. It also means more direct legal entitlements for individuals (e.g. in the case of the EU Digital Covid Certificate Regulation or the European Health Data Space Regulation), as well as more obligations (e.g. the EU Digital Covid Certificate Regulation or the Schengen Border Code) and risks for potential infringements of disproportionate limitations of fundamental rights (e.g. European Health Data Space Regulation or the Cross-border Health Threats Regulation).

Next, the additional obligations and the risk of potential limitations of fundamental rights generally do not correspond with increased opportunities for individuals to access EU Courts. Nor do they initiate the development of any new provisions which would acknowledge other types of either administrative remedies or direct claims for individuals to the institutions responsible for overseeing the EU/national administration which enforces new regulations.[96] One exception to that statement should be highlighted and applauded: the European Health Data Space Regulation contains several provisions on additional, individual remedies (see Arts 21 and 81, which provide for the right to lodge a complaint with a digital health

[96] *Cf.* recital 62 of the preamble to the EU Digital Covid Certificate regulation (but not a specific provision).

authority; Art. 71, on the right to opt out of the processing of electronic personal health data for secondary use; and Art. 100, on the right to receive compensation).

Relatedly, health data mobility gained a special status through a new instrument of collecting, sharing and using data via the European Health Data Space Regulation,[97] and through designated, additional clauses for health data protection and processing within several acts (see e.g. Art. 10 of the EU Digital Covid Certificate Regulation; Arts. 27–28 of the Cross-border Health Threats Regulation).

Secondly, the regulatory measures at the EU level that were studied in the research show a clear tendency to treat health (public health) as a security issue as well as a strong focus on public health emergency preparedness (e.g. Cross-border Health Threats or the Schengen Border Code), crisis management and the availability of medicinal products and vaccines on the internal market (e.g. modified rules on European Medicines Agency and European Centre for Disease Prevention and Control). Furthermore, a greater integration of border management, public health emergencies and free movement of persons seems to be found in some of those acts (e.g. the EU Digital Covid Certificate or the Schengen Border Code), which may lead to legal and rights-related implications for individuals in EU. Those regulations also reinforce an increase of EU powers at the intersection of health protection and the free movement of persons and public health emergencies.

Thirdly and institutionally, several of the researched EU regulations were related to organisational developments, either new bodies within existing structures (e.g. the Advisory Committee on public health emergencies, within the Commission's Directorate General responsible for health, Art. 24 of the Cross-border Health Threats Regulation)[98] or broader powers for existing EU agencies (rules on the European Medicines Agency and the European Centre for Disease Prevention and Control). Those institutions were also allocated considerable budgets to fund their new their responsibilities in research, scientific expertise and medical product management.

Consequently, from a financial perspective the adopted regulations also indicate the EU's capability to react to the pandemic and manage the crisis through specific recovery and funding programmes (positive integration). For example, a huge budget (EUR 5.3 trillion) was assigned to a Union programme in the field of health ("EU4Health Programme") for the period 2021–2027.[99] Another example is the European Health Data Space Regulation, where EUR 810 million was initially al-

[97] *See also* Case C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949 regarding the direct applicability and enforcement of the General Data Protection Regulation in the context of creating a national mobile application for COVID-19 epidemiological monitoring.

[98] *See also* Commission Decision of 16 September 2021 establishing the Health Emergency Preparedness and Response Authority 2021/C 393 I/02 [2021] OJ C 393I/3–8.

[99] An initial budget of EUR 6 trillion for the period 2022–2027 was assigned, although 1 trillion has already been reallocated. For comparison, in earlier budgetary frames, the EU budget for health was estimated to be around EUR 450 million.

located for digitalisation in the field of health and the creation of a digital platform for the operation of the European Health Data Space project. The question of what real benefits at the national level those funds can bring remains unanswered.

The next section offers a few insights about the potential effects of adopting EU regulatory measures on health and mobility.

4.2. Social market re-regulation at the EU level?

The examination of secondary law in this study prompts the following cautious observations. The number, content and legal form of the regulatory acts suggest that the EU was able to effectively carry out the political processes of adopting positive integration and responding to the needs of market regulation during the pandemic.

It can be thus noted that, substantively, the regulations in question expanded the field of EU legal harmonisation and increased EU influence on (and interconnection with) national health, movement of persons and border management policies.[100] It likely also indicates a more legally unified approach to integration and an influence on the autonomy of MSs. Those implications are shaped by the fact that EU powers in both health care and public health *de iure* are quite limited (see Art. 168 TFEU), while *de facto* they are stretched according to political needs. As a result, the options of the EU to regulate and impact national health policies (in combination with the internal market powers to regulate) are various and expansive, for example, through the use of other legal bases available in the EU Treaties (see Art. 114 TFEU – the Single Market legal basis). Some authors thus suggest that the structure of those powers (in health) should be re-considered.[101]

Others argue that the EU-level regulation of health excludes considerations of the rights (and values) which are impacted, or to put it more elegantly, the "EU health policy is a balancing act"[102] where the varying interests and rights of communities and individuals are protected through structurally asymmetric processes. However, the change in the character of and relationship between those asymmetries, as this article analysed, requires more research – empirical research in particular – to establish to what extent and how those rights and interests are impacted. For example, the question emerges of whether the generous financing of the European Health Union (and the creation of the European Health Data Space) indeed translates into the capability of the EU to realise social objectives and "market correction policies" in the field of health (and mobility of patients/persons). Also unclear is the potential of the re-distribution of money through EU health fun-

[100] I do not focus here on product-related issues regarding access to medical products, joint procurement of vaccinations, etc.

[101] *See e.g.* Seitz, *supra* note 7, pp. 543–566; *Editorial Comments...*, *supra* note 7, pp. 974–984.

[102] de Ruijter, *supra* note 8, p. 190.

ding programmes and regulations (which apply at the health–mobility nexus) to actually be transformed into real benefits for individuals in the MSs through potential investment in health care systems (which are often underfunded or incur debts) and financing of research and infrastructure at the national level.[103] More knowledge is also needed as to who the real beneficiaries of the EU-level re-regulation and resource re-distribution prompted by the pandemic are (e.g. state agencies, NGOs, economic entities or patients) and whether those policies really support the realisation of the individual's right to health (which is a key aspect from the perspective of individual rights).

One issue in particular should cause concern when one considers the growing regulation and re-regulation at the EU level in the fields of health and mobility: ordinary individuals (EU citizens) in MSs, in the above-presented contexts, usually have a limited capacity to participate and influence the EU-level legislative processes, or challenge before the EU courts the regulatory acts underpinning EU-level policies (particularly when those take the form of regulations).[104] The next section presents those concerns.

4.3. The EU acts of secondary law and the CJEU cases declared inadmissible

The research for this article revealed a high number of inadmissible cases regarding EU secondary law (see Appendix 1 and 2 below). Many individuals from several MSs have challenged regulations, delegated regulations and implementing decisions relating to various aspects of regulatory acts adopted at the EU level (health policy). The complaints included the period for recognising the new EU digital COVID certificate,[105] the exemption of minors from this period,[106] the exportation of COVID-19 vaccines to Northern Ireland,[107] granting authorisation to certain COVID-19 vaccines[108] and annulling the Covid Digital Certificate Regulation.[109] All these actions were rendered inadmissible due to a lack of legal standing under Art. 263(4) TFUE to challenge acts which are not of a direct concern to an individual – a long-known interpretative position of the CJEU.[110] It is easy to downplay

[103] *Ibidem*, pp. 182–185.

[104] *Cf.* A. Alemanno, *When Failure Succeeds and Success Fails: A Reality Check on the European Citizens' Initiative*, VerfassungsBlog, 19 June 2025, available at: https://verfassungsblog.de/european-citizens-initiative/ (accessed 30 June 2025).

[105] Case T-103/22 *ON v. Commission*, EU:T:2022:658.

[106] Case T-101/22 *OG and Others v. Commission*, EU:T:2022:661 and the appeal (C-754/22 P).

[107] Case T-161/21 *Order McCord v. Commission*, EU:T:2021:910.

[108] Case T-786/22 *Frajese v. Commission*, EU:T:2023:457; Case T-632/21 *Karin Agreiter and Others v. Commission*, EU:T:2022:135; Case T-464/21 *Faller and Others v. Commission*, EU:T:2022:68.

[109] Case T-527/21 *Stefania Abenante and Others v. Parliament and Council*, EU:T:2021:750; T-503/21 *Lagardère, unité médico-sociale v. Commission*, EU:T:2021:750.

[110] *Cf.* K. Szepelak, *Does the Court of Justice Practice What It Preaches? Upholding the Value of Rule of Law in the Interpretation of Article 263(4) TFEU*, European Law Blog, 21 May 2025, available at: https://www.europeanlawblog.eu/pub/wga8jjtx/release/1 (accessed 30 June 2025).

the inadmissibility of those cases as procedural matters,[111] but they also show an existing (and growing?) gap between the amount of EU positive integration, especially in the form of regulations and in the field of health where EU has a limited competence (Art. 168 TFEU), and the possibility for individuals to seek judicial review of EU-level regulation. In other words, there are limited possibilities to seek justice although EU secondary law on the health–mobility nexus functions as a complement, or even a substitute, to national welfare/"market correction" policies (e.g. those regulating some aspects of vaccination).

This also shows a problematic, substantive asymmetry between individuals who cannot appeal to the CJEU in those cases (because of limited or no EU competence under Art. 168 TFEU or a lack of standing under Art 263(4) TFEU) and EU institutions which adopt regulatory measures on the nexus of health and the Single Market (product- and person-related), notwithstanding limited or no EU competence under Art. 168 TFEU.

The only available possibility for individuals in EU MSs in such cases remains to initiate national proceedings and to prompt a court to refer a preliminary question to the CJEU. However, this may also be unsuccessful, as the case *Azienda Ospedale-Università di Padova* demonstrates. In a rather unconvincing judgment, the Court decided that the preliminary questions regarding conditional marketing authorisations for medicinal products for human use; the issuing, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates to facilitate free movement during the COVID-19 pandemic; and the obligation to vaccinate health care personnel against COVID-19; and various fundamental rights, including the right to work, was not admissible.[112]

Ultimately, this means that, again, it will be a national court that will decide on the applicability of legal provisions, and a resulting model of integration upholding either EU or national law (negative and/or positive integration).[113] It will also be a national court that will enforce decisions regarding EU/state social policies pursued by EU legislation in line with the general principles of EU law and the national constitutional system in order to protect individual rights based on the Charter and the EU Treaties.

[111] *Editorial Comments...*, *supra* note 9, p. 583.

[112] Case C-765/21 *D.M. v. Azienda Ospedale-Università di Padova*, EU:C:2023:566.

[113] *See also* J. Kranz, *Supremacy Over Primacy...? Reflections on Legal Controversies between Poland and the European Union (2015–2023)*, 43 Polish Yearbook of International Law 13 (2024).

CONCLUSIONS: RIGHTS OF INDIVIDUALS ON THE SINGLE MARKET AT THE NEXUS OF HEALTH AND MOBILITY DURING THE PANDEMIC

The research for this article was prompted, on the one hand, by the fact that the pandemic exposed the dimension of health protection and the movement of persons in the Single Market as a key aspect of EU integration, and on the other hand, by the observation of changes in the CJEU's approach towards a review of national measures (less interventionist) and of a growing body of EU regulations (secondary law). The conclusions which stem from the research merit the following final comments and recapitulations.

Firstly, it is apparent from this research that the Single Market dynamic at the intersection of health protection and the freedom of movement of persons is much too complex to be described by the structural symmetry thesis, as put forward by F.W. Scharpf. His arguments about the imbalance between the processes of negative integration (very strong judicialisation and deregulation via the CJEU's actions) and of positive integration (weak EU-level legislative, political processes that does not provide sufficient re-regulation of social standards via secondary/positive EU law) no longer fully portray the present, post-pandemic reality. In that sense, the findings of van den Brink and his colleagues shed new light on the asymmetry thesis. For example, they are convincing with regard to the observation that currently, in some cases, the processes of positive and negative integration are mutually reinforcing.[114] For example, a deferential review of the CJEU regarding the introduction of border controls on the grounds of public health at the national level may be said to coincide with the introduction of new, harmonised rules through an EU regulation.[115] Yet, their findings say less about social and democratic standards with regard to the situation of individuals in MS. The claim that the structural asymmetry of EU integration led to lower social and democratic standards seemed Scharpf's main concern, along with a decrease, or even loss, of socio-democratic ideals of market regulation and a welfare state. The latter, according to Scharpf, could be possible only at the national level.[116]

The case study conducted for this article shows unequivocally that more empirical research is needed to better understand the implications for the protection of fundamental, including socioeconomic, individual rights and Treaty-based claims

[114] van den Brink, Dawson, Zglinski, *supra* note 14, pp. 18–21.

[115] Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L 1717; Case C-128/22 *Nordic Info*, EU:C:2023:951.

[116] Scharpf, *supra* note 13, pp. 14–18, 28–29.

at the national level, and more broadly, guaranteeing social advantages and democratic standards accordingly. A special focus should be placed on exploring spaces and gaps between the situation of ordinary individuals (EU citizens) and EU-level judicial review and regulation.[117] The proof about the growing re-regulation of some social objectives at the EU level (e.g. the EU COVID-19 Digital Certificate, EU4Health or the European Health Data Space) does not fully answer the question of how much harmonisation and regulations on health and mobility of individuals actually translate into the right to health, access to health care and investment in better quality health care at the national level.

Secondly, the inquiry into judicial review standards and the development of EU secondary law at the intersection of health protection and movement of persons can be interpreted as demonstrating a trend of the CJEU conducting less interventionist reviews of national measures. It means somewhat less significant Treaty-based individual rights, but it is unclear whether it is advantageous to the protection of individual rights at the national level. The deferential-review case law also usually protects national health care systems and the powers of public health authorities, which may indicate a trend towards a stronger market etatism in the long term.

On the other hand, this analysis of the case law can be also interpreted as revealing a variety of approaches adopted by the CJEU in its judgments – if looked at from the perspective of the intensity of review. The tendency of the Court to become less interventionist and more deferential, especially towards decisions of national judicial bodies, is not unequivocal because there are some clear examples of judgments where the Court performed a strict scrutiny, resulting in negative integration distributive consequences for individuals and MSs.

Thirdly, the research for this text also shows a substantive asymmetry, at the intersection of health protection and free movement of persons during the pandemic, between limited access of individuals to the EU Courts (and case law) in the case of most regulatory acts (positive integration, see section 4.3) and the political (and legal) possibility for EU institutions and MSs to adopt a variety of measures on either the health or the Single Market legal bases. Given the CJEU's unchanged interpretation of Art 263(4) TFEU on the legal standing for individuals, one way to address this asymmetry is to include directly applicable and enforceable provisions (on judicial remedies and claims) in the positive integration laws. At the same time, the research demonstrated that less de-regulation at the national level (negative integration) resulting from a less interventionist review of the CJEU and more re-regulation at the EU level (positive integration) do not always lead to a better protection and

[117] *Cf.* L. Azoulai, *Reconnecting EU Legal Studies to European Societies*, Verfassungsblog, 19 March 2024, available at: https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/ (accessed 30 June 2025).

enforcement of Treaty-based and fundamental rights of individuals in the EU. As a results, national courts become key determiners of the protection of those rights (which is not a new phenomenon in the EU), and they sometimes play an essential role in choosing an applicable path of integration (see section 4.2.).

Finally, the hope of this paper is also to foster more discussion about the effects of the picture of asymmetries in EU health/mobility policy and about their socio-economic effects, which can eventually lead to freshly informed debates about the causes and remedies of social and socio-democratic deficits in EU integration. The question of whether Europe can indeed achieve the ideals of a social market economy (about which F.W. Scharpf was very sceptical) is still valid, as a recent, widely discussed report by Mario Draghi indicates.[118] The report has called for both more competitiveness and a continuation of the European welfare state. Accordingly, there is a continued need to explore those angles, especially in the face of rising populism, right-wing conservatism and a weakening belief in democracy among young people throughout the EU.[119] Finally, those debates are also important in view of the need for a coherent vision of the future EU policy on health *vis-à-vis* the MSs' policies – one that is based on equality and solidarity.[120]

APPENDIX 1. – LIST OF CASE LAW

Subject matter directly relevant to health and mobility of persons (restrictions)

- C-128/22 *Nordic Info BV v. Belgische Staat*, EU:C:2023:951.
- C-659/22 *RK v. Ministerstvo zdravotnictví (Application Mobile Covid-19)*, EU:C:2023:745.
- C-206/22 *TF v. Sparkasse Südpfalz*, EU:C:2023:384.
- C-411/22 *Thermalhotel Fontana*, EU:C:2023:490.
- C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer (On-line Teaching)*, EU:C:2023:270.
- C-710/23 *L.H. v. Ministerstvo zdravotnictví*, EU:C:2025:231.
- C-683/21 *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949.
- C-245/21 and C-248/21 *Bundesrepublik Deutschland v. MA and Others*, EU:C:2022:709.

[118] M. Draghi, *The Future of European Competitiveness*, Publications Office of the European Union, Luxembourg: 2025.

[119] *See* W. Bieliaszyn, *Sondaż. Młodzi Europejczycy tracą wiarę w demokrację. Szczególnie widać to w Polsce* [Survey: Young Europeans are Losing Faith in Democracy. This is Especially Visible in Poland], wyborcza.pl, 4 July 2025, available at: https://wyborcza.pl/7,75399,32078649,sondaz-mlodzi-europejczycy-traca-wiare-w-demokracje-szczegolnie.html (accessed 30 June 2025).

[120] *Cf.* also A. de Ruijter, T.K. Hervey, B. Prainsack, *Solidarity and Trust in European Union Health Governance: Three Ways Forward*, 46 The Lancet Regional Health – Europe 1 (2024).

- C-823/21 *Commission v. Hungary*, EU:C:2023:504.
- C-123/22 *Commission v. Hungary*, EU:C:2024:493.
- C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

Subject matter indirectly relevant to health and mobility of persons (restrictions)

- C-18/21 *Uniqa Versicherunge AG v. VU*, EU:C:2022:682.
- C-363/21 *Ferrovienord*, EU:C:2023:563.
- T-710/21 *Robert Roos and Others v. European Parliament*, EU:T:2022:262.
- C-458/22 P *Robert Roos and Others v. European Parliament*, EU:C:2023:871.
- T-724/21 *IL and Others v. Parliament* (case removed), EU:T:2021:873.
- T-207/18 *Plastics Europe v. ECHA* (biosfenol), EU:T:2020:623.
- T-496/20 *CRII-GEN and Others v. Commission* (glifosat), EU:T:2021:179.
- C-667/21 *Krankenversicherung Nordrhein* (health data processing, not related to Covid), EU:C:2023:433.

other irrelevant cases have been omitted.

Inadmissible preliminary rulings

- C-220/20 *XX v. OO (Suspension de l'activité judiciaire)*, EU:C:2020:1022.
- C-765/21 *Azienda Ospedale-Università di Padova*, EU:C:2023:566.
- C-161/21 *Comune di Camerota*, EU:C:2021:833.

Inadmissible applications with appeals – No locus standi

- T-161/21 *McCord v. Commission*, EU:T:2021:910.
- T-786/22 *Frajese v. Commission*, EU:T:2023:457.
- T-103/22 *ON v. Commission*, EU:T:2022:658.
- T-101/22 and C-754/22 P *OG and Others v. Commission*, EU:T:2022:661.
- T-632/21 *Agreiter and Others v. Commission*, EU:T:2022:135.
- T-527/21 *Abenante and others v. Parliament and Council*, EU:T:2021:750.
- T-503/21 *Lagardère, unité médico-sociale v. Commission*, EU:T:2021:750.
- T-469/21 *Natale v. Italy*, EU:T:2021:704.
- T-464/21 *Faller and Others v. Commission*, EU:T:2022:68.
- T-418/21 *Alauzun and Others v. Commission and EMA*, EU:T:2022:39.
- T-267/21 *Amort and Others v. Commission*, EU:T:2021:802.
- T-165/21 *Amort and Others v. Commission*, EU:T:2021:805.
- T-136/21 *Amort and Others v. Commission*, EU:T:2021:807.
- T-96/21 *Amort and Others v. Commission*, EU:T:2021:804.
- T-633/20 *CNMSE and Others v. Parliament and Council*, EU:T:2021:678.
- C-749/21 P *CNMSE and Others v. Parliament and Council*, EU:C:2022:699.

– APPENDIX 2. – LIST OF SECONDARY LAW

Acts with subject matter directly relevant to health and mobility of persons

- Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU [2022] OJ L 314/26.
- Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 [2025] OJ L 2025/327.
- Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic AND Regulation (EU) 2022/1034 of the European Parliament and of the Council of 29 June 2022 amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2022] OJ L 173/37.
- Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic [2021] OJ L 211/24.
- Regulation (EU) 2022/1035 of the European Parliament and of the Council of 29 June 2022 amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic [2022] OJ L 173/46.
- Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L 2024/1717.

Acts on institutional developments indirectly relevant to health and mobility of persons

- Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices [2022] OJ L 20/1.
- Regulation (EU) 2024/568 of the European Parliament and of the Council of 7 February 2024 on fees and charges payable to the European Medicines Agency, amending Regulations (EU) 2017/745 and (EU) 2022/123 of the European Parliament and of the Council and repealing Regulation (EU) No 658/2014 of the European Parliament and of the Council and Council Regulation (EC) No 297/95 [2024] OJ L 2024/568.
- Regulation (EU) 2022/112 of the European Parliament and of the Council of 25 January 2022 amending Regulation (EU) 2017/746 as regards transitional provisions for certain in vitro diagnostic medical devices and the deferred application of conditions for in-house devices [2022] OJ L 19/3.
- Regulation (EU) 2022/2370 of the European Parliament and of the Council of 23 November 2022 amending Regulation (EC) No 851/2004 establishing a European centre for disease prevention and control [2022] OJ L 314/1.
- Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014 [2021] OJ L 107/1.
- Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC [2022] OJ L 333/164.

Acts not directly relevant to health and mobility of persons

- Regulation (EU) 2024/1938 of the European Parliament and of the Council of 13 June 2024 on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC [2024] OJ L 2024/1938.
- Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC [2023] OJ L 135/1.

– Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms [2023] OJ L 132/21.
– Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L 2023/2225.
– Directive (EU) 2023/2673 of the European Parliament and of the Council of 22 November 2023 amending Directive 2011/83/EU as regards financial services contracts concluded at a distance and repealing Directive 2002/65/EC [2023] OJ L 2023/2673.

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THE EFFECTIVENESS OF THE EUROPEAN APPROACH TO IRREGULAR MIGRATION: A LEGAL AND ECONOMIC ASSESSMENT[**]

Abstract: *There are few certainties in the field of migration. From the factors that drive migrants to flee their countries and the conditions they expect to find in the destination country to migrants' flows, routes and methods, migration policy is constantly functioning within a field of uncertainty. Yet, the importance of better managing migration processes is becoming increasingly relevant due to the multiple factors that stimulate the international movement of people, such as conflict, political or economic instability or climate change. The uncertainty surrounding the European Union's (EU) ability to manage migration has spurred a twofold approach: the criminalisation of migrant smuggling (in an all-encompassing way) and the externalisation of migration policy through agreements with third countries. However, are these approaches effective, or should the EU consider alternative strategies to address the challenges posed by irregular migration? The purpose of this article is to evaluate the effectiveness of the EU's policies on irregular migration, by exploring firstly the effectiveness of criminal law in deterring migrant smuggling and secondly the EU's recent emphasis on externalisation. The consequences of both are examined in an effort to determine their effectiveness towards the objective. The article concludes with some suggestions for the way forward.*

Keywords: migration, effectiveness, migration policy, migrant smuggling, externalisation

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INTRODUCTION

Migration, understood as the movement of people from one location to another (city, region or country) with the intention of resettling temporarily or permanently, is not a recent phenomenon: whenever people needed better opportunities, they moved.[1] Only recently has migration become a highly sensitive and politicised issue,[2] with countries reconfiguring their migration policy through measures aimed at restricting immigration and redirecting or returning migrants to other countries.

The significance of this topic is underscored by the number of policies and agreements being adopted within the EU and globally: examples include the European Agenda on Migration,[3] the EU Action Plan on Return,[4] the EU Pact on Migration and Asylum[5], the New York Declaration for Refugees and Migrants[6] or aspects of migration in the United Nations Sustainable Development Goals.[7] The timing of these initiatives is not coincidental: the efforts to effectively manage migration became relevant to the EU's agenda at the height of the 2015–2016 migration crisis, during which over 1.2 million people applied for asylum.[8] Managing, and thus forecasting, migration is relevant for policy, population and business decisions.[9] Still, measuring and predicting migration remains a complex task due to several factors: the lack of uniform concepts, the motives driving migration, the inherent uncertainty of the process – which is dependent on human agency and external

[1] *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, International Council on Human Rights Policy, Geneva: 2010, p. v.

[2] For example, Germany's reintroduction of border controls to identify undocumented migrants, in response to a crime allegedly committed by an asylum seeker – *see* E.M. Bredler, *"Not Only Legally Dubious But Also Ineffective": Five Questions to Lilian Tsourdi*, Verfassungsblog, 27 September 2024, available at: https://verfassungsblog.de/not-only-legally-dubious-but-also-ineffective/ (accessed 30 June 2025).

[3] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, Brussels, 13 May 2015, COM(2015)240 final.

[4] As part of a comprehensive plan to address migration – European Commission, *Communication from the Commission. EU Action Plan on return*, Brussels, 9 September 2015, COM(2015)453 final.

[5] Presented by the Commission in 2020, the Pact comprises several legislative texts and non-legislative initiatives. It entered into force in June 2024, although it will not enter into application until two years from this date.

[6] UNGA resolution of 19 September 2016, *New York Declaration for Refugees and Migrants*, A/RES/71/1.

[7] United Nations Department of Economic and Social Affairs, Population Division, *Integrating Migration into the 2030 Agenda for Sustainable Development*, December 2015, available at: https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20155.pdf (accessed 30 June 2025).

[8] See the analysis in V. Pavlov, R. Cardoso, *The New Trend in the EU's Migration Policy: Is Externalization Any Better?*, 10(3) Journal of Liberty and International Affairs 88 (2024), p. 96.

[9] J. Bijak, *Migration Forecasting: Beyond the Limits of Uncertainty*, 6 Global Migration Data Analysis Centre, Data Briefing Series 1 (2016), p. 1.

factors – the limited data and the need for different approaches for various migrant groups.[10] As a result, numbers, statistics and forecasts may vary greatly depending on the selected criteria, the available data[11] and the extrapolated estimates, making migration a topic prone to manipulation, as it is difficult to prove or disprove assertions.[12] Recognising that some aspects of migration can be known and managed while others cannot is particularly consequential for acknowledging the limitations of any course of action.[13] Especially for the long-term perspective, the focus should be on preparedness rather than management, as forecasts are too uncertain[14] and the clarity that states seek to impose[15] is often impossible to attain.

While the emphasis is on controlling and managing immigration (from third countries), especially in "frontline states",[16] it is also paradoxically clear that Europe needs those migratory inflows, due to its ageing populations, labour force decline and reduced intra-EU migration (particularly from newer Member States (MSs)).[17]

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[10] *Ibidem*, pp. 2 and 5. Specifically regarding the decision to initiate a migratory movement, P.G.J. O'Connell, *Migration Under Uncertainty: "Try Your Luck" Or "Wait and See"*, 37(2) Journal of Regional Science 331 (1997).

[11] For example, data related to Germany, one of the most important MMs with regard to migration, is lacking from Eurostat – *see* J. Bijak, D.V. de Vilhena, M. Potančoková, *White Paper on Migration Uncertainty: Towards Foresight and Preparedness. Harnessing Scientific Knowledge for Better Policy: Evidence and Recommendations from the Horizon 2020 Project "Quantifying Migration Scenarios for Better Policy" (QuantMig)*, Population Europe, Berlin: 2023, p. 17.

[12] Usually hinging upon existent data on some migration processes, but not others, thus failing to recognise that any knowledge in the field of migration can only be approximate (*ibidem*, pp. 27–28).

[13] *Ibidem*, p. 6.

[14] M. Czaika, H. Bohnet, F. Zardo, J. Bujak, *European Migration Governance in the Context of Uncertainty*, QuantMig, Southampton: 2022, pp. 7–8, available at: https://www.quantmig.eu/project_outputs/project_reports/ (accessed 30 June 2025).

[15] N. Maru, M. Nori, I. Scoones, G. Semplici, A. Triandafyllidou, *Embracing Uncertainty: Rethinking Migration Policy through Pastoralists' Experiences*, 10(5) Comparative Migration Studies 1 (2022).

[16] Reykjavík Declaration – United around Our Values, Reykjavik, 16–17 May 2023, available at: https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html (accessed 30 June 2025).

[17] *See* Bijak, de Vilhena, Potančoková, *supra* note 11, pp. 4 and 25 with figures. A telling example is that of Bulgaria, with one of the fastest shrinking populations (*see Countries with Declining Population 2025*, World Population Review, available at: https://worldpopulationreview.com/country-rankings/countries-with-declining-population). Concurringly, J. Portes sees restrictionism (displaying tight controls over legal paths into the country) and protectionism of the "national identity" (granting short-term visas to meet labour demands) as impractical, as it has been demonstrated that neither approach provides a solution – J. Portes, *The Big Idea: Why We're Getting the Immigration Debate All Wrong*, The Guardian, 2 September 2024, available at: https://www.theguardian.com/books/article/2024/sep/02/the-big-idea-why-were-getting-the-immigration-debate-all-wrong (both accessed 30 June 2025). One example is Finland, where work-based immigration is actively promoted – S. Hanhinen, *The Finnish Authorities Should Work Together More Closely to Integrate Work-based Immigrants Better*, 2 Migration Policy and the EU 80 (2023).

This reliance is evident in the overrepresentation of migrants in certain sectors of the economy.[18]

In the EU, *effectiveness* plays a crucial role, not only as a facet of subsidiarity in exercising its powers (Art. 5(3) of the Treaty of the European Union (TEU)) but also as a necessary requirement for a legitimate use of criminal law,[19] which the EU uses to manage migration as well. As challenges in the common migration policy grew, the EU shifted towards externalising its approach, forming strategic partnerships with third countries to address irregular entry, migrant readmission and smuggling. The purpose of this article is therefore to analyse the effectiveness of the EU's approach to irregular migration, through both criminal law and externalisation.

To achieve this, the article starts with a brief definition of migration and effectiveness, thus establishing the parameters used in the analysis. Then, the available data is explored (with the caveats exposed above) to determine whether the EU's action is effective. Finally, some conclusions and suggestions are made for the most effective use of EU funds. In this regard, a mixed methodology is used, given the interdisciplinary nature of the study, including legal, documentary and case-law analysis, as well as statistical and empirical data analysis. The conclusions highlight that the European two-pronged approach to migration is largely ineffective, suggesting that European funds would be better used in alternative methods for improving migration management.

1. DEFINING AND MEASURING MIGRATION

Overall, migration refers to the movement of a person or group of people from one location to another, whether that is within a country or international; this study focusses on international migration into the EU, rather than intra-EU movement. This migratory movement can be further categorised as *regular* or *irregular*,[20] depending on whether the migrants have authorisation from the destination state (and/or transit state) to enter its territory.[21] This concept became relevant with the creation of the nation-state, with clearly defined borders and a corresponding

[18] N. Broberg, J. Gonnot, F. Poeschel, M. Ruhs, *Essential Work, Migrant Labour: What Explains Migrant Employment in European Key Sectors?*, ESPOL-Lab, Lille: 2024.

[19] For a detailed analysis, *see* R. Cardoso, *Navigating Troubled Waters: evaluating the Function and Material Legitimacy of European Criminal Law*, 43 Polish Yearbook of International Law 95 (2023).

[20] The term "irregular" is preferred over "illegal", as the latter may entail a moral judgement, thus equating unsanctioned migration with a crime. "Irregular" simply indicates that migrating people did not meet the established requirements for authorised entry, transit or stay in a given territory. *See also* UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, para. 6, available at: https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632 (accessed 30 June 2025).

[21] While there are also restrictions on leaving a country, the irregularity discussed in this study is limited to entering a country (or rather, the territory of the EU), or irregular migration detected within the EU.

territory where sovereign power is exercised; sovereignty has been interpreted as allowing states the unilateral choice of who gets to enter and who must leave their territory, thus making immigration a "taboo".[22] The formalisation of entry, transit or residence has correspondingly given rise to the need to access the opportunities in that territory without meeting legal requirements, given the disproportion between migratory intentions and legal possibilities.[23]

Although the motives behind the decision to migrate vary, the legal possibilities established by states are meant to carve a distinction between desired and undesired migrants: "highly skilled workers" are usually welcome, while "unskilled workers" have slim chances of finding a regular path into the country.[24]

The concept of *mixed migration* emerges precisely to acknowledge "that migration flows involve individuals travelling with various motivations, challenging states and policymakers to ensure humanitarian and human rights protections for all migrants while managing border crossings."[25] Myriad reasons influence migrants' decision to leave one's country and to choose another, known as *push* and *pull factors*.[26] *Push factors* include those that drive individuals to leave – for instance, the first EU migration crisis was mainly caused by the Arab Spring's uprisings and rebellions.[27] These events forced nearly 3 million people to enter Europe in the three-year period between 2014 and 2016 (see Table 1 below, which uses the number of asylum applications as a benchmark[28]). The same can be said for the years following 2020, with ongoing conflicts in other countries such as Ukraine or Afghanistan.

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[22] The expression is from V. Chetail, *Demystifying Sovereignty: Totem and Taboo of Migration Control in International Law*, 118 American Journal of International Law Unbound 193 (2024). The author argues that the conflation of sovereignty with the power to control immigration is a myth that has persisted since the nineteenth century.

[23] I. van Liempt, *A Critical Insight into Europe's Criminalisation of Human Smuggling*, Swedish Institute for European Policy Studies, Stockholm: 2016, p. 2.

[24] Chetail, *supra* note 22. The author further comments: "By enforcing this double standard, migration control is orchestrating an organized hypocrisy: while being the political scapegoat of globalization, undocumented workers can be exploited at will by filling the gaps in the labor market."

[25] A. Mesnard, F. Savatic, J.-N. Senne, H. Thiollet, *The Effects of Externalization Policies on Refugees and other Migrants*, Externalizing Asylum, available at: https://externalizingasylum.info/the-effects-of-externalization-policies-on-refugees-and-other-migrants/ (accessed 30 June 2025).

[26] M. Minetti, *Human Trafficking and Migrant Smuggling: Analysis of the Distinction through the Lens of the "European Migration Crisis" and of the Italian Policy Response*, University of Kent, Canterbury: 2016, pp. 11ff.

[27] L. Buonanno, *The European Migration Crisis*, in: D. Dinan, N. Nugent, W.E. Patterson (eds.), *The European Union in Crisis*, Palgrave Macmillan, London: 2017, pp. 100–130.

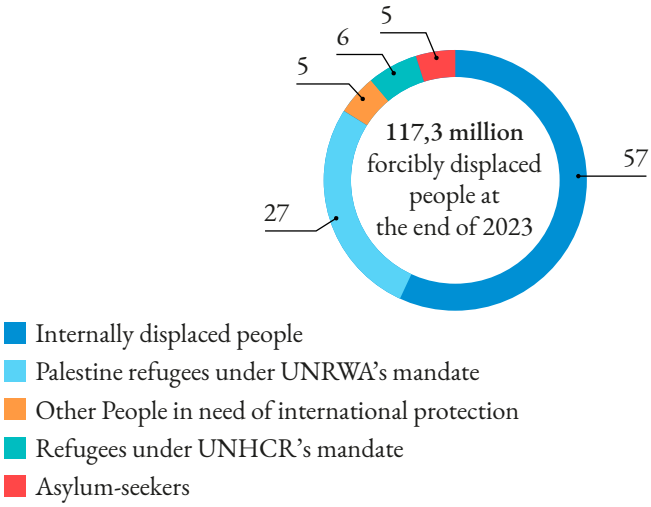
[28] The number of asylum requests is a source for forecasts by the European Union Agency for Asylum, in addition to data available on the Global Database of Events, Language and Tone (the GDELT project) and the number of detected irregular border crossings at the EU's borders (provided by Frontex) – *see* Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. 11.

Table 1. Number of asylum applications in the EU and its MSs from 2014 to 2023

Country/ Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
European Union (27 countries, from 2020)	530,560	1,216,860	1,166,815	620,265	564,680	628,930	415,235	535,985	873,680	1,049,550
Belgium	14,045	38,990	14,250	14,035	18,130	23,105	12,905	19,545	32,100	29,260
Bulgaria	10,805	20,160	18,990	3,470	2,465	2,075	3,460	10,890	20,260	22,390
Czechia	905	1,235	1,200	1,140	1,350	1,570	790	1,055	1,335	1,130
Denmark	14,535	20,825	6,055	3,125	3,465	2,605	1,420	1,995	4,475	2,355
Germany	172,945	441,805	722,270	198,255	161,885	142,450	102,525	148,175	217,735	329,035
Estonia	145	225	150	180	90	100	45	75	2,940	3,980
Ireland	1,440	3,270	2,235	2,910	3,655	4,740	1,535	2,615	13,645	13,220
Greece	7,585	11,370	49,875	56,940	64,975	74,910	37,860	22,660	29,125	57,895
Spain	5,460	14,600	15,570	33,035	52,730	115,175	86,380	62,050	116,135	160,460
France	58,845	70,570	76,790	91,965	126,580	138,290	81,735	103,790	137,510	145,095
Croatia	380	140	2,150	880	675	1,265	1,540	2,480	2,660	1,635
Italy	63,655	82,790	121,185	126,550	53,440	35,005	21,330	45,200	77,200	130,565
Cyprus	1,480	2,105	2,840	4,475	7,610	12,695	7,065	13,260	21,590	11,660
Latvia	365	330	345	355	175	180	145	580	545	1,625
Lithuania	385	275	415	520	385	625	260	3,905	905	510
Luxembourg	1,030	2,360	2,065	2,320	2,225	2,200	1,295	1,365	2,405	2,615
Hungary	41,215	174,435	28,215	3,115	635	465	90	40	45	30
Malta	1,275	1,695	1,735	1,610	2,035	4,015	2,410	1,200	915	490
Netherlands	21,780	43,035	19,285	16,090	20,465	22,485	13,660	24,730	35,500	38,320
Austria	25,675	85,505	39,875	22,455	11,580	10,985	13,400	37,800	109,775	56,135
Poland	5,610	10,255	9,780	3,005	2,405	2,765	1,510	6,240	7,700	7,720
Portugal	440	870	710	1,015	1,240	1,735	900	1,350	1,975	2,600
Romania	1,500	1,225	1,855	4,700	1,945	2,455	6,025	9,065	12,065	9,875
Slovenia	355	260	1,265	1,435	2,800	3,615	3,465	5,220	6,645	7,185
Slovakia	230	270	100	150	155	215	265	330	500	370
Finland	3,490	32,150	5,275	4,330	2,950	2,445	1,445	1,355	4,815	4,450
Sweden	74,980	156,115	22,335	22,190	18,635	20,770	11,765	9,015	13,180	8,945

It is noteworthy that the total number of first-time asylum seekers in the EU for this decade exceeds 7.6 million. When compared to the EU population, which stood at 449.2 million as of January 2024,[29] it may be concluded that the number of asylum seekers in the EU equates to approximately 1.7% of the Union's citizens. Still, it is important to acknowledge that these push factors represent only one aspect of the person's decision, and mostly, even during conflict, people decide against leaving their country,[30] as shown in Figure 1 below.

Figure 1. Share of forcibly displaced people by type as of the end of 2023



Pull factors include the perceived or known conditions in the destination country, attitudes towards migration, the presence of an established migrant community and policy uncertainty.[31] As factors change, migration flows shift, impacting countries differently based on the mix of push and pull factors. To facilitate comparison, Figure 2 illustrates the impact on each MS, by analysing the total number of first-time asylum requests per country from 2014 to 2023 (asylum applicants made up 85.9% of the 1,046,336 irregular entries in 2015,[32] compared to the total number of asylum applications in the same year).

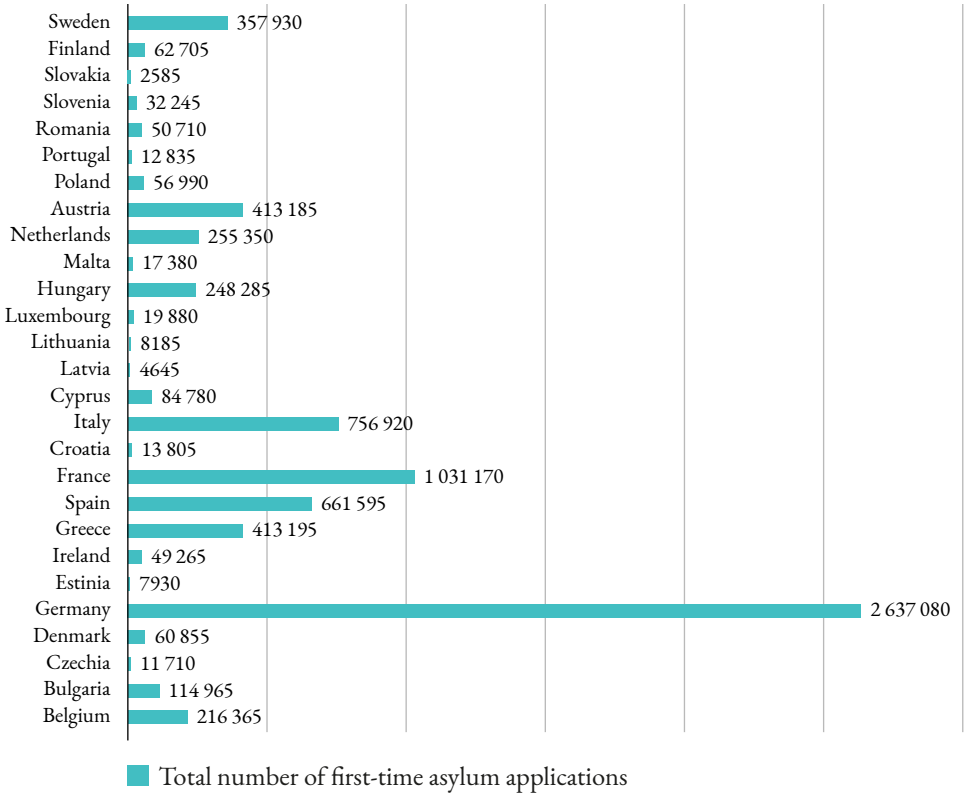
[29] *EU Population Increases Again in 2024*, Eurostat, available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20240711-1 (accessed 30 June 2025).

[30] *See* Bijak, de Vilhena, Potančoková, *supra* note 11, p. 11.

[31] *Ibidem*, pp. 12–14. A practical example (from the UK) can be found in Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. 4.

[32] According to Frontex and the Spanish Ministry of Interior –*Migration Flows: Eastern, Central and Western Routes. Yearly Irregular Arrivals (2015–2024)*, Council of the European Union, available at: https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/ (accessed 30 June 2025).

Figure 2. Total number of first-time asylum applications per EU MS for the period 2014–2023



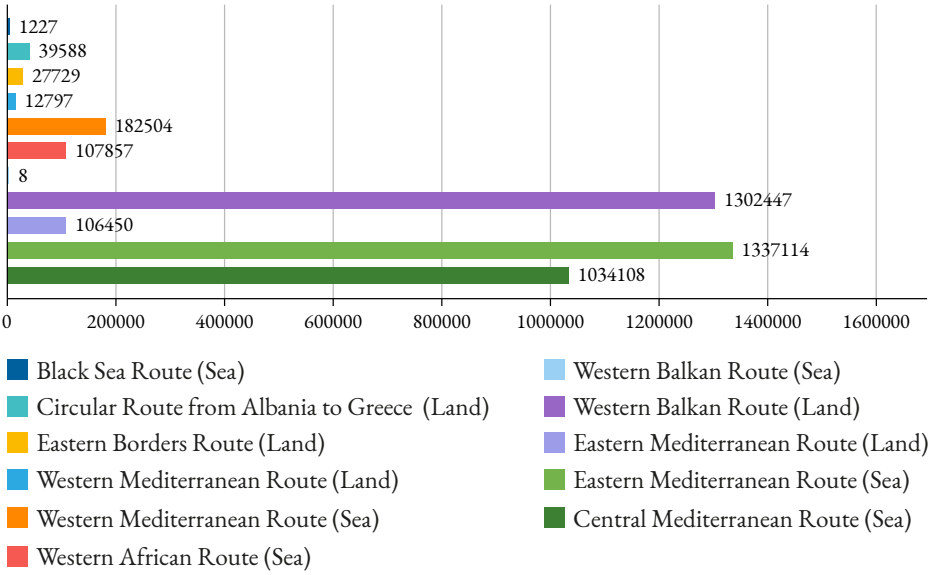
As shown, Italy, France and Germany are the most affected by these immigration processes. Their combined share of asylum seekers nears 60% of all applications in the EU during that decade. In order to evaluate the significance of these numbers, it is important to compare the number of asylum applicants to the population of each country. Germany's share is approximately 3%, Italy's is 1.3% and France's is 1.5%. In contrast, the impact is higher in some MSs hosting a smaller number of applicants: Austria with 4.5%, Sweden with 3.4%, Malta with 3.1% and Hungary with 2.6%.[33]

The migratory routes only partially explain such variation: for instance, as Germany is not a border state of the EU, it should not be one of the most impacted

[33] The calculations were made by comparing the number of asylum applications to the population of each MS at the time of writing – *EU countries*, European Union, available at: https://european-union.europa.eu/principles-countries-history/eu-countries_en. The public *perception* of these percentages is distinctively higher around the globe – *see Perils of Perception: A 30-Country Ipsos Global Advisor Survey*, Ipsos, 8 November 2024, pp. 16–21, available at: https://www.ipsos.com/en/perils/perils-perception-2024 (both accessed 30 June 2025).

countries, while Greece should have much higher numbers. Figure 3 displays the number of irregular crossings at the EU's external borders, aggregated by route.

Figure 3. Irregular border crossings at the external borders of the EU and Schengen Associated Countries, data aggregated by route, between 2014 and 2023



There are three main (irregular) immigration routes to Europe, affecting most MSs on the eastern and southern borders: the Western Balkan Land Route (Albania, Bosnia, Kosovo, Montenegro, North Macedonia and Serbia), the Eastern Mediterranean Sea Route (Bulgaria, Cyprus and Greece) and the Central Mediterranean Sea Route (Italy and Malta).

The quantification and categorisation of migrants is particularly relevant, as this information is often used to justify policy decisions, but the chosen concept of migration can influence the analysis, inflating or deflating the numbers[34] and providing a skewed picture of reality[35] that supports a particular state response to migration. However, migrating is a recognised human right,[36] encompassing the right to leave

[34] Czaika, Bohnet, Zardo, Bujak, *supra* note 14.

[35] S. Carrera, E. Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach*, in: S. Carrera, E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, Centre for European Policy Studies, Brussels: 2016, pp. 2ff. The problems are mainly threefold: considering irregularity to be an empirical, immutable reality; failing to acknowledge that people may re-enter the territory of the Union and should therefore not be double-counted (thus artificially inflating the numbers); and incorrect or inaccurate data from migration authorities.

[36] *See* E. McDonnell, *Challenging Externalisation Through the Lens of the Human Right to Leave*, 71 Netherlands International Law Review 119 (2024).

one's country and return to it,[37] being legally recognised in Art. 13 of the Universal Declaration of Human Rights, Art. 12 of the International Covenant on Civil and Political Rights and Art. 2 of Protocol 4 of the European Convention on Human Rights. This right can only be restricted (and not completely obliterated) for relevant reasons such as national security, public health or criminal prosecution,[38] and restrictions should be applied in a non-arbitrary and exceptional manner. However, in practice, the right to migrate depends on both the origin state's exit policies and the destination state's entry policies. In this regard, the EU's policies may actually contribute to the problem it has tried to curb for a decade (irregular entry into the EU) by not providing legal pathways for people in need of international protection.[39]

2. DEFINING AND MEASURING EFFECTIVENESS

The principle of effectiveness is a key driver of the EU's activity, particularly when adopting criminal law measures. Criminal law must only be adopted when there is no other, less intrusive way of achieving a given goal (*ultima ratio*); additionally, it must do so effectively, which means it must be an adequate means of action. This derives from the broader principle of proportionality (Art. 5(4) TEU), binding the EU to act only when national measures are not effective at meeting the established goal (principle of subsidiarity) and to act only to the extent *necessary*. If the effectiveness of the EU's action is questionable, then its legitimacy is also in doubt.

That goal must also align with the constitutional identity of the EU and its MSs – which is not analysed here.[40] Rather, the intention is to define the EU's objective (effectiveness towards *what*) and evaluate the current policy in its striving for that objective. While that evaluation is made in each topic, it is important to establish the comparative benchmark for effectiveness beforehand.

The EU's "effective management of migration" includes ensuring secure external borders, implementing fast, efficient asylum procedures and establishing

[37] E. Guild, *To Protect or To Forget? The Human Right to Leave a Country*, EU Immigration and Asylum Law and Policy, 27 December 2017, available at: https://eumigrationlawblog.eu/to-protect-or-to-forget-the-human-right-to-leave-a-country/ (accessed 30 June 2025).

[38] S. Elserafy, *The Smuggling of Migrants across the Mediterranean Sea: States' Responsibilities and Human Rights*, Arctic University of Norway, Tromsø: 2018, p. 50.

[39] H. Crawley, *How Europe's Migration Policies are Contributing to the Migration Crisis*, 2 Migration Policy and the EU 21 (2023).

[40] For an analysis of the material legitimacy of the migrant smuggling legislation, *see* R. Cardoso, *Legitimacy and Rationalization in European Criminal Law: A Critical Analysis of the Criminalization of Migrant Smuggling*, 9(2) University of Bologna Law Review 37 (2024). In particular, the problem is exacerbated by the European turn towards the securitisation of migration, which is being driven by political parties across Europe and their portrayal of migration as a security threat. A detailed analysis can be found in Ł. Gruszczyński, R. Friedery, *The Populist Challenge of Common EU Policies: The Case of (Im)migration (2015–2018)*, 42 Polish Yearbook of International Law 221 (2022).

an effective system of solidarity and responsibility, focussed especially on border management, targeting migrant smugglers and expediting returns.[41] The clues for the meaning of effectiveness extend to European case law: in cases where a MS's criminalisation entailed the delayed return of a migrant, the Court of Justice of the EU (CJEU) deemed it contrary to EU law,[42] as it prevents the speedy return of irregular migrants. From the EU's actions and the CJEU's case law (although with the benefit of opposing national legislation that criminalises migrants), it can be inferred that effectiveness ultimately means keeping unwanted migrants out of the EU's territory, either by preventing their arrival or swiftly returning those without the legal grounds to remain. It is against this benchmark that effectiveness is evaluated in the following sections.[43]

The issue is that this concept of effectiveness invariably leads to human rights violations and their erosion (especially when uncoupled from sufficient legal safeguards), as well as the emergence of new phenomena aiming to exploit this overarching goal, such as the "instrumentalisation of migrants". This refers to third countries using migrants to destabilise the EU by overwhelming asylum systems, through facilitating, promoting or forcing them to reach EU borders in large numbers. The first instance of such a "threat" was in 2021, when Belarus provided visas and transportation for people with Middle Eastern and African nationalities, prompting an unprecedented response from Latvia, Lithuania and Poland: to restrict the right to asylum and authorise pushbacks.[44] This concept is problematic in and of itself, but especially because of its repercussions, namely the normalisation and legalisation of violating international obligations,[45] not only condoned but actively supported by the EU.[46]

This represents the latest development in the erosion of migrants' human rights, one that starkly contradicts obligations stemming from international and European

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[41] *Commission Takes Stock of Key Achievements on Migration and Asylum*, European Commission, 12 March 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1413 (accessed 30 June 2025).

[42] For instance, Case C-61/11 PPU, *El Dridi*, EU:C:2011:268. *See* N. Vavoula, *C-61/11 PPU – El Dridi. Criminalisation of Irregular Migration in the EU: The Impact of El Dridi*, in: V. Mitsilegas, A. di Martino, L. Mancano (eds.), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*, Hart Publishing, Oxford: 2019, pp. 273–289.

[43] Effectiveness may acquire different meanings depending on the legislation and policy at stake. Different meanings will be mentioned where appropriate.

[44] *See* A. Ancite-Jepifánova, *Beyond the "Hybrid Attack" Paradigm: EU-Belarus Border Crisis and the Erosion of Asylum-Seeker Rights in Latvia, Lithuania and Poland*, 15(2) AVANT 1 (2024).

[45] *Ibidem*, pp. 17ff.

[46] Despite the criticism voiced against the Commission for not censuring the actions of these MSs, it has recently even shown its support in a tangible manner, by allocating additional funds for controlling irregular migration, totalling EUR 170 million (*inter alia* EUR 17 million for Latvia, EUR 15.4 million for Lithuania and EUR 52 million for Poland) – *Commission Steps Up Support for Member States to Strengthen EU*

law.[47] Such erosion began with the adoption of the European policy regarding the overcriminalisation of migrant smuggling and the agreements made and upheld with third countries for migration control.

3. THE CRIMINAL LAW APPROACH

Historically, the first legislative instruments to address migrant smuggling and human trafficking were the Palermo Protocols, annexed to the UN Convention against Transnational Organized Crime (CTOC). Their insertion in the CTOC meant that the criminal conduct[48] had to meet three additional criteria (besides the elements defined in the Protocol): it should be a *serious crime*[49] of a *transnational nature*[50] involving a *criminally organised group*.[51]

Migrant smuggling and human trafficking can be challenging to differentiate. Theoretically, the two phenomena differ in five key aspects:[52] *consent*, as migrants consent to smuggling, while trafficking victims do not (or their consent is invalid due to coercion, fraud, abuse or exploitation); *intention*, as traffickers always intend to exploit the victim at the destination; *status*, as trafficked people are always victims, whereas the smuggled migrant may also be the object of the crime; *transnationality*, as trafficking does not entail crossing borders, while smuggling does; and *profit*, as traffickers profit from exploiting the person, while the smuggler's profit usually consists of a fee for their services (when it is a constituent element of the criminal conduct). The main difference is their respective legal consequences,[53] fuelled by

Security and Counter the Weaponisation of Migration, European Commission, 11 December 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6251 (accessed 30 June 2025).

[47] *E.g.* some cases before the European Court of Human Rights (ECtHR): *C.O.C.G. and Others v. Lithuania* (App. No. 17764/22), 2 December 2022; *H.M.M. and Others v. Latvia* (App. No. 42165/21), 3 May 2022; or *R.A. and Others v. Poland* (App. No. 42120/21), 27 September 2021. The sheer number of pending cases (over 30) showcases the problematic nature of these MSs' actions. However, the Court has examined cases with similar contours – e.g. the case law in I. Lang, *Instrumentalisation of Migrants: It is Necessary to Act, But How?*, EU Immigration and Asylum Law and Policy Blog, 15 October 2024, available at: https://eumigrationlawblog.eu/instrumentalisation-of-migrants-it-is-necessary-to-act-but-how/ (accessed 30 June 2025).

[48] Defined in Art. 3 and criminalised in Art. 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004), 2241 UNTS 507.

[49] Punished with imprisonment of at least 4 years (Art. 2(b) CTOC).

[50] A crime committed or affecting several states, or whose preparatory acts or authors are in more than one state (Art. 3(2) CTOC).

[51] A structured group of three or more people acting together in order to commit serious crimes with the intention of obtaining a material or financial benefit (Art. 2(a) CTOC).

[52] *Human Trafficking and Migrant Smuggling: How They Differ*, Human Rights First, 12 June 2014, available at: https://humanrightsfirst.org/wp-content/uploads/2022/11/human-trafficking-v-smuggling.pdf (accessed 30 June 2025).

[53] In more detail, R. Cardoso, *As Funções do Direito Penal Europeu e a Legitimidade da Criminalização. Entre o harm principle e a protecção de bens jurídicos*, Coimbra, Almedina: 2023, pp. 500, fn 1487–1489 and the corresponding text.

narratives sometimes inaccurately portraying migrant smugglers as vast criminal groups spanning multiple countries and obtaining large profits, despite empirical studies suggesting that this may not always be the case.[54]

3.1. The criminalisation of migrant smuggling in the EU

The EU's legislation came about in 2002;[55] it currently states that a migrant smuggler is "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens" or "any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens" (Art. 1(1)(a)(b) of Directive 2002/90/EC). This definition dispenses with the more restricting criteria of the Protocol and the CTOC, in particular the intention of smuggling migrants to obtain profit. The absence of this element, combined with the lack of a mandatory humanitarian clause, irrevocably marked the European legislation as overly broad, allowing for the criminalisation of conduct that clearly lacks criminal intent.[56]

The most often identified problems relate to the criminalisation of solidarity,[57] which is rising – especially in border states – the criminalisation of migrants, including children,[58] and the faulty judicial procedure in such cases.[59] This is enabled by the all-encompassing nature of European legislation (despite the claims of the EU and MSs),[60] which perniciously devotes most resources to restricting[61] and policing civil

[54] *Ibidem*, pp. 497ff; L. Achilli, *The Missing Link: The Role of Criminal Groups in Migration Governance*, 50(20) Journal of Ethnic and Migration Studies 5045 (2024), p. 5051.

[55] Through the combination of Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17, forming the *Facilitators Package*.

[56] There is a pending case in the CJEU regarding the overcriminalisation permitted by the Facilitators Package: Case C-460/23, *Kinsa*, EU:C:2023:784. The case that led to this request involved a migrant who brought her niece and daughter (aged 13 and 8) with her, all using fake passports; she was subsequently accused of migrant smuggling, on the basis of the Italian legislation (which is in conformity with its European counterpart), precisely because she was bringing the two minors with her.

[57] *Cases of Criminalisation of Migration and Solidarity in the EU in 2023*, PICUM, Brussels: 2024, p. 7, available at: https://picum.org/blog/at-least-117-people-criminalised-for-helping-migrants-in-europe-in-2023/ (accessed 30 June 2025).

[58] *Ibidem*, pp. 11 and 14.

[59] *Ibidem*, p. 12.

[60] For a brief analysis of their arguments, *see* S. Zirulia, *The "délit de solidarité" before the Grand Chamber of the EU Court of Justice: Reflections in the Aftermath of the Kinsa Case Hearing (C-460/23)*, EU Law Live, 1 July 2024, available at: https://tinyurl.com/4z7pvmh8 (accessed 30 June 2025).

[61] Especially restricting freedom of assembly and association – *Europe Must End Repression of Human Rights Defenders Assisting Refugees, Asylum Seekers and Migrants*, Commissioner for Human Rights of the Council of Europe, 22 February 2024, available at: https://www.coe.int/en/web/commissioner/-/europe-

society[62] rather than targeting actual migrant smugglers. In this sense, the European legislation proves ineffective in allocating finite resources (financial, technical and human) to insignificant conduct, thus leaving fewer resources available to combat more harmful, truly criminal conduct.[63]

This non-exclusively European approach[64] is also ineffective regarding asylum and the fundamental rights of migrants. Asylum[65] is made contingent on state discretion, while the overly broad criminalisation allows for the blatant disregard of the most basic rights (such as life or integrity) and hinders migrant rescues by deeming them migrant smuggling (e.g. when conducted by human rights organisations without authorisation). Furthermore, the widespread practice of detaining migrants disproportionately infringes their right to liberty, as it often lacks a sufficient legal justification[66] or exceeds what would be considered proportional.[67]

Confronted with harsh criticism, in 2023 the Commission proposed a new definition of migrant smuggling that entails gaining a profit, thus formally (but not expressly!) opposing the criminalisation of conduct motivated by humanitarian reasons.[68] However, it added other conduct, such as potentially causing serious

must-end-repression-of-human-rights-defenders-assisting-refugees-asylum-seekers-and-migrants (accessed 30 June 2025).

[62] S. Carrera, V. Mitsilegas, J. Allsopp, L. Vosyliute, *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society*, Hart Publishing, Oxford: 2019.

[63] S. Zirulia, *Facilitating Irregular Immigration under the Lens of the Proportionality Principle – Brief Notes on the Advocate General's Conclusions in the Kinsa Case (C-460/23)*, EU Law Live, 21 November 2024, available at: https://tinyurl.com/2m8j6hxd (accessed 30 June 2025).

[64] As demonstrated by the Canadian *Appulonappa* case (*ibidem*).

[65] *See* V. Mitsilegas, *Editorial. Reforming the "Facilitators' Package" through the Kinsa Litigation: Legality, Effectiveness and Taking International Law into Account*, Eurojus.it rivista, 31 July 2024, available at: https://tinyurl.com/25mhzmbc (accessed 30 June 2025).

[66] The ECtHR seems to take a firmer stance on detention being arbitrary (thus unlawful under the Convention), whereas the CJEU is more lenient towards MSs, allowing continued detention even when it is no longer (legally) justified. For a comparison, *see* ECtHR, *M.B. v. The Netherlands* (App. No. 71008/16), 23 April 2024, and case C-387/24 PPU *Bouskoura*, EU:C:2024:868. For and in-depth analysis of the concept of arbitrariness in detention, *see* C. Ferstman, *Conceptualising Arbitrary Detention: Power, Punishment and Control*, Bristol University Press, Bristol: 2024.

[67] Art. 31(2) of the 1951 Refugee Convention allows for *necessary* restrictions, and these should "only be applied until their status in the country is regularized or they obtain admission into another country". When interpreted according to the guidelines, the "necessity" requirement must mean that restrictions serve "legally authorized purposes, are proportionate and are subject to judicial control" – UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, p. 6, available at: https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632 (accessed 30 June 2025). Current European practices appear to be non-compliant with a strict interpretation of the obligations that stem from international law – commenting and comparing, L. Bernardini, *"Criminal or Nay?" Migrants' Administrative Detention within the IAHRS: Lessons (Not) Learned by Europe*, 8(3) Revista Brasileira de Direito Processual Penal 1537 (2022).

[68] Art. 3 of the European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA*, Brussels, 28 November 2023, COM(2023)755 final.

harm to individuals or publicly instigating third-country nationals to enter, transit or stay within the territory of any MS (in response to migrant instrumentalisation) alongside aggravating circumstances, and criminalisation of attempt, inciting, aiding and abetting these acts.[69] While the inclusion of profit is a positive step, experts argue that this definition remains too broad[70] and that failing to introduce a humanitarian exception in the legal (therefore, binding) part of the text and introducing the new criminalised conduct maintain a hostile attitude towards migration. The inclusion of the "likelihood of causing serious harm", combined with the lack of a clear humanitarian exception, can still lead to the criminalisation of humanitarian organisations, as a riskier rescue operation could inadvertently result in harm.[71]

This Proposal was recently appraised by the Council, who introduced multiple changes, including a way to allow MSs to criminalise assistance to illegal entry without profit (removing the Commission's statement regarding the non-criminalisation of migrants and family members), heavier sanctions, new rules on aggravating and mitigating circumstances, limitation periods and jurisdiction.[72] The Parliament's opinion remains to be seen; however, such a piece of legislation would hardly curb the criticisms the current one faces.

3.2. The effectiveness of criminal law

Although two areas of the ineffectiveness of European criminal law have been identified – allocation of resources and protection of the migrant's rights (including the right to request asylum) – it must be assessed whether this approach is successfully keeping migrants out, which is the apparent primary goal of the EU. Relevant factors include the number of irregular arrivals (which the EU tries to reduce through the threat of criminal punishment), the number of accusations and trials for migrant smuggling (to assess the deterrent effect over time) and its impact on returning migrants who are not permitted to remain in the EU.

Irregular arrivals at the EU border have decreased since 2015–2016 (Figure 4), but it is doubtful that the conduct's criminalisation caused it, as the definition of this crime dates back to 2002 and it did not prevent irregular arrivals in that decade. The dwindling numbers are most likely due to other European practices, namely

[69] *Ibidem*, Arts. 3 to 5.

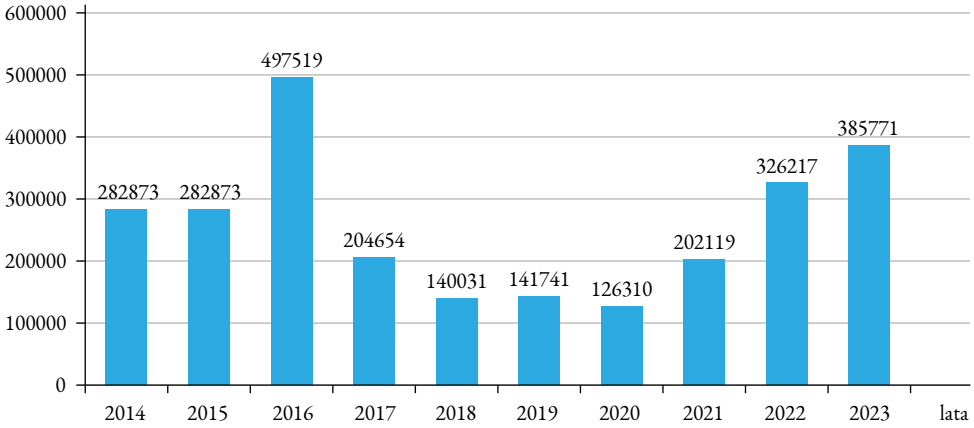
[70] Mitsilegas, *supra* note 65.

[71] Criticism in Parliamentary Assembly of the Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, pp. 14 and 15.

[72] For a comparison, *see* S. Peers, *The Council's Position on Proposed EU Law on Migrant Smuggling: Cynical Political Theatre?*, EU Law Analysis, 9 December 2024, available at: https://eulawanalysis.blogspot.com/2024/12/the-councils-position-on-proposed-eu.html (accessed 30 June 2025).

agreements with third countries for migration control, which make it harder for migrants to reach European territory.

Figure 4. Irregular border crossings from 2014 to 2023, presented annually



Several issues with the data arise when evaluating the impact of migrant smuggling. In addition to those identified above, it is important to acknowledge that migrant smuggling thrives under prohibition: the European restrictive stance on legal entry was its catalyst, even before the perceived peak of 2015–2016.[73] Smugglers are found precisely where legal avenues for obtaining the desired result are lacking;[74] therefore, criminal law has no impact on their existence – it simply changes or creates routes in response to increased policing.[75] The lack of results is also implied in official European discourse, which recognises that the demand for smuggling services continues to rise[76] (independently of their penal consequences) and attributes the decline in certain routes to other policies.[77]

[73] For example, in 2002 there were already over 700,000 undocumented migrants in Italy – F. Fasani, *Country Report Italy. Undocumented Migration Counting the Uncountable. Data and Trends across Europe*, European Commission, Brussels: 2008, p. 31 available at: https://migrant-integration.ec.europa.eu/sites/default/files/2009-07/docl_9054_957632787.pdf (accessed 30 June 2025).

[74] For an analysis of the absence of legal pathways into Europe and its impact on irregular migration, *see* L. Martini, T. Megerisi, *Road to Nowhere: Why Europe's Border Externalisation is a Dead End*, European Council on Foreign Relations, 14 December 2023, available at: https://ecfr.eu/publication/road-to-nowhere-why-europes-border-externalisation-is-a-dead-end/ (accessed 30 June 2025).

[75] Scholars argue that the European asylum system is partly dependent on migrant smugglers (Achilli, *supra* note 54, p. 5046).

[76] *Understanding EU Action against Migrant Smuggling*, European Parliament, 12 December 2023, p. 1, available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)757577 (accessed 30 June 2025).

[77] *Ibidem*, p. 4.

To account for the number of irregular migrants resorting to smuggling services is all but impossible. Despite official European reports consistently repeating that 90% of irregular migrants resort to smuggling[78] and attributing the increase in irregular arrivals to such services,[79] this overquoted percentage is empirically questionable. Firstly, migration estimates are often inaccurate and can be exaggerated, which is acknowledged by international institutions and migration data collecting platforms, who claim that "data on smuggling are scarce, and there is no annual global report on migrant smuggling trends. Official statistics [...] are limited as many countries do not collect or publish such data."[80] Secondly, statistics fail to recognise that "most irregular migrants have entered Europe legally and subsequently overstayed their visa",[81] meaning that they did not use smuggling services. Thirdly, even if focussing only on the number of arrivals at the borders, this percentage is based on outdated data, with a very small sample from which to draw sufficient conclusions.[82] This unduly contributes to an estimation of migrant smuggling which may not exist at such high rates.

The issue is not only the circumvention of European rules, but also the amount of money flowing into this business, which may be funnelled into other criminal activities, as the prevailing narrative is that smuggling operations are controlled by organised criminal groups. Estimating these profits is, again, challenging, although the EU estimates prices ranging between EUR 2,000 and 5,000 per migrant,[83] with a total (global) annual gross amount between EUR 4.7 and 6 billion. On a global scale, estimates for the cost of smuggling services vary widely, depending on the route and risks involved. For instance, Asian migrants travelling to Europe through Africa

[78] *E.g. Preventing and Countering the Facilitation of Unauthorised Entry, Transit and Stay in the EU*, European Parliament, 22 March 2024, p. 2, available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)760365 (accessed 30 June 2025); or European Commission, *Communication from the Commission to the European Parliament and the Council on the Seventh Progress Report on the Implementation of the EU Security Union Strategy*, Brussels, 15 May 2024, COM(2024)198 final, p. 13.

[79] *Ibidem*, p. 2 (citing a 7% increase in irregular arrivals at the borders of the EU in 2023 compared to the previous year, which is attributed to a corresponding increase in smuggling activities, "as evidenced by a new record high number of migrant smugglers – over 15 000 – as per the reports by the Member States" to Frontex).

[80] *Smuggling of Migrants*, Migration Data Portal, 21 May 2024, available at: https://www.migrationdataportal.org/themes/smuggling-migrants (accessed 30 June 2025).

[81] Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10. We are assuming that the official statistics do not include situations where migrants enter using forged documents, as those would not be regarded as "legally entering a country". Indeed, the *Kinsa* case – pending before the CJEU – showcases exactly that such situations will be equally regarded and treated as migrant smuggling.

[82] *Ibidem*, p. 10: "this figure is an estimate based on 1,500 debriefings of migrants collected by Frontex and EU Member States in 2015."

[83] *See Latest Trends in Migrant Smuggling: Nearly 7000 Suspected Smugglers Reported, Increased Exploitation, Higher Prices*, Europol, available at: https://tinyurl.com/26a32p22 (accessed 30 June 2025).

reportedly pay between EUR 4,180 and 5,575 for the flight alone, while a smuggling journey from Agadez to Libya or Europe would be priced at EUR 1900–2850.[84]

It could be argued that profits, combined with the lack of legal entry routes into Europe, drive smuggling networks to become more organised and sophisticated. However, the idea that profits are high and reinvested in criminal activities is contested in the literature: besides the difficulty of following (and thus proving and calculating) money flows,[85] there is evidence suggesting that profits from migrant smuggling are often reinvested back into the community.[86]

The decrease in irregular arrivals is not due to the criminalisation of smuggling, but is it effective at punishing smugglers? Examining judicial data may help evaluate this question.

Table 2. Number of persons suspected of being involved in migrant smuggling by MS between 2016 and 2022

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Suspects
Austria	7	69	35	50	48	19	1,034	1,262
Belgium	-	353	93	-	138	-	201	785
Bulgaria	364	323	48	87	190	391	1,398	2,437
Croatia	167	321	620	983	692	885	774	4,442
Cyprus	19	14	8	17	19	22	88	187
Czechia	47	48	34	57	60	52	277	528
Denmark	279	124	151	90	36	49	69	798
Estonia	-	-	-	-	-	-	-	-
Finland	452	116	44	92	196	82	80	1,062
France	-	4,395	4,219	4,639	3,976	6,626	6,277	30,132
Germany	-	-	2,342	2,441	2,761	3,283	3,468	14,295
Greece	950	1,399	1,653	1,533	1,112	1,092	1,478	9,217
Hungary	745	-	-	-	362	789	1,828	3,724
Ireland	-	-	-	-	-	-	-	-
Italy	4,711	4,127	4,131	3,676	2,925	2,560	3,941	26,071

[84] *Smuggling of Migrants: The Harsh Search for a Better Life*, UNODOC, available at: https://www.unodc.org/toc/en/crimes/migrant-smuggling.html#_ednref8 (accessed 30 June 2025).

[85] Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10.

[86] G. Sanchez, *Five Misconceptions about Migrant Smuggling*, European University Institute, Fiesole: 2018.

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Suspects
Latvia	52	26	25	-	7	20	20	150
Lithuania	163	95	77	-	48	328	361	1,072
Luxembourg	-	-	-	-	-	-	-	-
Malta	0	-	-	0	2	-	-	2
Netherlands	378	-	63	-	29	-	-	470
Poland	220	194	132	82	87	427	801	1,943
Portugal	71	82	98	102	89	144	183	769
Romania	101	283	261	322	660	1,090	746	3,463
Slovakia	128	-	99	-	79	108	286	700
Slovenia	650	-	414	1,021	472	413	431	3,401
Spain	663	685	900	370	662	1,204	1,175	5,659
Sweden	226	100	136	-	104	150	124	840

Table 3. Persons imprisoned for migrant smuggling per MS between 2016 and 2022

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Persons Imprisoned
Austria	1	0	2	-	-	86	183	272
Belgium	-	-	-	-	-	-	-	-
Bulgaria	12	29	54	50	41	89	97	372
Croatia								-
Cyprus								-
Czechia	69	22	48	38	27	31	70	305
Denmark	-	-	-	-	-	-	-	-
Estonia	1	1	-	-	-	-	0	2
Finland	-	-	-	-	-	-	-	-
France	-	730	-	-	-	366	412	1,508
Germany	-	-	73	69	58	55	52	307
Greece	1,478	1,166	2,001	1,853	1,850	1,467	1,632	11,447
Hungary	646	-	-	3,445	870	1,977	1,938	8,876
Ireland	-	-	-	-	-	-	-	-
Italy	1,469	1,328	1,194	-	919	979	1,138	7,027

Country/ Year	2016	2017	2018	2019	2020	2021	2022	Total Number of Persons Imprisoned
Latvia	24	99	40	12	6	8	18	207
Lithuania	7	5	9	3	1	4	7	36
Luxembourg	-	1	-	-	-	-	-	1
Malta	0	-	-	0	2	7	4	13
Netherlands	-	-	-	-	-	-	-	-
Poland	16	12	19	21	17	23	31	139
Portugal	11	12	16	16	14	14	2	85
Romania	82	90	82	74	70	66	139	603
Slovakia	44	-	33	-	35	82	50	244
Slovenia	50	-	203	368	443	-	-	1,064
Spain	228	246	320	365	367	323	441	2,290
Sweden	20	11	6	3	1	3	3	47

As indicated in Tables 2 and 3, there is a significant difference between the numbers of people suspected and imprisoned for migrant smuggling. Recent data reveals that Eurojust investigated a total of 425 cases in 2023, nearly twice the number of cases in 2019.[87] The perceived significance of the crime is also rising internally – for instance, in Portugal the investigated cases multiplied exponentially in 2023, with a staggering 298% increase.[88]

Nevertheless, these are low numbers when compared to the estimated prevalence of the crime among irregular migrants: if 90% of irregular migrants used smuggling services, there should be much higher numbers of court cases as well. This difference might be due to two overlapping factors. Firstly, migrant smugglers may be organised groups that are somehow evading justice (namely, by never leaving their country of origin or entering a European jurisdiction); secondly, the cases that are tried and punished are those of low-level smugglers[89] (who represent a comparatively low risk),

[87] Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 10. These figures are still widely distant from the reported cases by Europol: between January and June 2016 (and one must bear in mind that this was a peak year for irregular migration), "Europol received intelligence on more than 7000 newly-identified migrant smuggling suspects", 95% of them male with an average age of 36 – Europol (n. 81).

[88] *Relatório Anual de Segurança Interna*, Sistema de Segurança Interna, Lisboa: 2023, p. 53, available at: https://www.portugal.gov.pt/pt/gc24/comunicacao/documento?i=relatorio-anual-de-seguranca-interna-2023 (accessed 30 June 2025).

[89] Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 11.

humanitarian associations and the migrants themselves:[90] for performing rescue operations and for, in most cases, driving vehicles with other migrants, respectively.

A potential third factor coincides with another aspect of effectiveness: the low numbers in the judiciary may also be attributed to the CJEU's jurisprudence, which has prioritised the return of migrants instead of criminalisation.[91] If this is the case, it would be further confirmation that most smuggling suspects are indeed migrants, who are not convicted because they must be returned. If organised groups exist, they are able to continue their activities, and new (legitimate) rules would not impact the effectiveness of European criminal law.

Effectiveness is not simply measured by numbers, despite the EU's focus on expulsions and returns. This statistical approach often overlooks the underlying reasons for low return rates or the drivers for migration (and they partially coincide). Criminalisation is only one factor influencing the decision to migrate;[92] destination state policies play a significant role, whether through employment, human rights, economic welfare or even the existing migrant networks there – many of these were found to drive away migration in addition to an anti-immigration attitude.[93] MSs' policies are designed to restrict lawful entry into the EU. In this regard, the EU's visa, externalisation and containment policies contribute to migrant smuggling, as most asylum seekers will have no legal means to apply without first resorting to false documents and clandestine methods of reaching the territory.[94]

Considering the established benchmark and other aspects of effectiveness, the criminalisation of migrant smuggling must be deemed ineffective. It has not reduced the number of irregular migrants entering the Union, it misdirects finite resources towards low-risk, low-harm activities, it increases the potential for human and fundamental rights' violations (of both migrants and European citizens), breaches international obligations (such as the right to claim asylum) and leads to nonsensical results, such as keeping migrants in the territory only to punish them (ultimately curbed by the CJEU's jurisprudence).

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[90] *See Cases of Criminalisation…*, *supra* note 57.

[91] The case of *El-Dridi* and subsequent case law.

[92] *See* Bijak, de Vilhena, Potančoková, *supra* note 11, p. 8, who propose a complex migration decision-making process in which individuals form migratory aspirations, evaluate information about options, prepare and realise migratory decisions and consider the locus of control and the degree of agency in taking migratory decisions.

[93] *Ibidem*, p. 13.

[94] UNHCR, *Guidelines on International Protection No. 14*, 23 September 2024, HCR/GIP/24/14, para 4; and Ancite-Jepifánova, *supra* note 44, p. 18.

4. THE EXTERNALISATION APPROACH

Another European approach to unwanted migration is to externalise migration control systems, which entails engaging third countries in its management, so that migrants can be subject to these controls before they are in EU territory.[95] These practices range from pushback operations (though not formally labelled as such) to improving asylum systems in third countries and establishing lists of safe countries for return[96] – all with the common goal of progressively rendering the EU impervious to unwanted (irregular) migration.

4.1. The main agreements in the field of migration

Several agreements have been struck between the EU or MSs and third states[97] to halt the flow of migrants into Europe. As the primary goal is to prevent people from leaving that territory, the EU or MSs provide the necessary material and personnel.[98] By 2020 the EU had signed agreements with 18 countries for readmission[99] (a simplified procedure for returning people to third countries). Additionally, negotiations were launched in 2016 with Nigeria, Tunisia and Jordan, and efforts were being made to engage with Morocco and Algeria as well.

However, political challenges, the COVID-19 pandemic and the Russian aggression in Ukraine have spurred the partial suspension of certain agreements,[100] leading to the need to negotiate new ones. For instance, on 2 May 2024, the EU signed an agreement with Lebanon under which it will provide EUR 1 billion over

[95] This enables states to avoid responsibility for violating migrants' rights, as they are not under their jurisdiction. Critically, V. Moreno-Lax, *Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control*, 71 Netherlands International Law Review 21 (2024).

[96] There are nine instruments that make up the European toolbox for externalisation; for the full list, *see* M. Rosina, I. Fontana, *The Tools of External Migration Policy in EU Member States*, EUROPP Blog, 17 September 2024, available at: https://blogs.lse.ac.uk/europpblog/2024/09/17/the-tools-of-external-migration-policy-in-eu-member-states/ (accessed 30 June 2025).

[97] While these are not within the competence of the Union (and therefore criticism is best directed at the MSs), the EU's failure to oppose, criticise or punish the outcomes of such agreements implies endorsement and thus merits criticism. For an analysis, *see* V. Guiraudon, *20 Years After Tampere's Agenda on "Illegal Migration": Policy Continuity in Spite of Unintended Consequences*, in: S. Carrera, D. Curtin, A. Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, Florence: 2020, p. 152.

[98] *E.g.* Council of the European Union, *Strategic Review on EUBAM Libya, EUNAVFOR MED Op Sophia & EU Liaison and Planning Cell*, 15 May 2017, Doc. 9202/17, p. 36, para. 130ff.

[99] *See EU Migrant Return Policy – Cooperation with Third Countries on Readmission*, European Court of Auditors, Luxembourg: 2020, p. 6, available at: https://www.eca.europa.eu/lists/ecadocuments/ap20_07/ap_migrant_return_policy_en.pdf (accessed 30 June 2025).

[100] Such as the agreement with Belarus, suspended in 2021 and later used to retaliate against European restrictive measures – European Commission, *A Renewed EU Action Plan against Migrant Smuggling (2021–2025)*, Brussels, 29 September 2021, COM(2021)591 final, p. 5.

three years to support the country's economy and prevent the irregular migration of Syrian refugees, following tensions in Cyprus and an increase in the number of arrivals from Syria via Lebanon.[101] It should be noted that this EUR 1 billion represents a substantial portion of the EUR 22.7 billion allocated for migration and border management (budget for 2021–2027).[102] Though not identical, all agreements consistently aim to keep migrants within third states and to facilitate returns from the EU.

The EU-Türkiye statement of cooperation from 2016 commits the EU to accepting one Syrian national for every Syrian returned to Türkiye and providing the necessary financial support (EUR 6 billion) and expediting visas for Turkish citizens. In exchange, Türkiye's borders are reinforced against migrant smuggling, and it agrees to the facilitated return of asylum seekers coming therefrom (so that the MSs do not process them).[103] Regarding its effectiveness, the outcome was most likely the rerouting of the migration flow to Libya,[104] rather than decreasing the number of irregular migrants coming into Greece. Meanwhile, Türkiye has suspended the return component of the agreement and recent judgments highlight the challenging conditions faced by migrants seeking asylum in the country.[105]

In 2023, the EU and Tunisia signed a Memorandum of Understanding (MoU). Under the guise of a "holistic approach to migration",[106] the EU aimed to improve Tunisian border management, increase search and rescue operations (conducted by the Tunisian authorities) and establish procedures for facilitated returns of Tunisian nationals – while providing financial and technical support. More than

[101] *EU External Partners: Member States Push for Outsourcing of Migration Procedures to Third Countries – EU Signs € 1 Billion Migration Deal with Lebanon – Tunisian Authorities Expel Hundreds of Migrants to Border with Algeria – Migrants Released from Detention in Libya*, European Council on Refugees and Exiles, 10 May 2024, available at: https://tinyurl.com/m25vnhcz (accessed 30 June 2025).

[102] The budget itself has been significantly increased from the previous EUR 10 billion for the period 2014–2020: *Asylum and Migration in the EU: Facts and Figures*, European Parliament, 30 June 2017, available at: https://tinyurl.com/2a9e98s3 (accessed 30 June 2025).

[103] Elserafy, *supra* note 38, p. 57. For an account of the agreement, *see* Pavlov, Cardoso *supra* note 8, p. 92; *see also Legislative Train 08.2024 / 1 Foreign Affairs – AFE. EU-Turkey Statement and Action Plan*, European Parliament, available at: https://www.europarl.europa.eu/legislative-train/carriage/eu-turkey-statement-action-plan/report?sid=8301 (accessed 30 June 2025). The EU's continued support can be gleaned from the recent Communication from the Commission to the Council and European Parliament, *Eighth Annual Report of the Facility for Refugees in Türkiye*, Brussels, 19 December 2024, COM(2024)593 final – where the allocation of another EUR 355.6 million for refugee support and migration management is analysed.

[104] Mesnard, Savatic, Senne, Thiollet, *supra* note 25.

[105] G. Ovacık, M. Ineli-Ciger, O. Ulusoy, *Taking Stock of the EU-Turkey Statement in 2024*, 26 European Journal of Migration and Law 154 (2024).

[106] *Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia*, European Commission, 16 July 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887 (accessed 30 June 2025).

EUR 1.7 billion was invested prior to the MoU.[107] However, Tunisia is clearly uninterested in playing a part in the EU's externalisation programme: it still lacks a general law on asylum and refuses to include clauses on readmission, fearing the uncontrolled use of both (and its classification as a safe third country) to use its territory as a "disembarkation platform"[108] and containment area for unwanted foreign nationals. European funds and support led to much-deserved criticism regarding the EU's complicity in human rights violations,[109] yet an additional EUR 160 million was allocated to bolster the Tunisian coastguard and counter-smuggling efforts.[110] The outcome of this MoU was not what the EU was expecting: departures from Tunisia continued unabated, while the Tunisian economy (transportation, accommodation etc.) experienced rapid growth fuelled by the migration market; likewise, social instability in the country prompted even more migrants (namely sub-Saharan Africans) to come to Europe seeking asylum, facilitated by that same economy.[111] This suggests that this agreement is ineffective by any standard (asylum, respect for human rights or even maintaining irregular migrants outside of the EU).

Egypt signed an agreement with the EU in early 2024: EUR 200 million will be invested in border management, returns and combating migrant smuggling.[112] This is part of a larger deal which bequeaths EUR 7.4 billion to Egypt, with EUR 5 billion in soft loans to boost the economy.[113] Its effectiveness cannot yet be assessed, but its focus on securitisation and disregard for human rights[114] (while Egypt secures European political support) suggests limited effectiveness (within this aspect).

The MoU between Italy and Libya in 2017 was endorsed by the EU, with the consequent (indirect) allocation of EUR 700 million (until 2022)[115] to enhance

[107] *EU Migration Support in Tunisia*, European Commission, June 2023, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/5fd60eeb-7748-4f29-bda6-de875be53317_en (accessed 30 June 2025).

[108] H. Sha'ath, F. Raach, *Cooperation within Reason: Tunisia's Approach to Asylum and Readmission*, 26 European Journal of Migration and Law 179 (2024).

[109] T. Strik, R. Robbesom, *Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control*, 71(1) Netherlands International Law Review 199 (2024).

[110] Martini, Megerisi, *supra* note 74, p. 16.

[111] *Ibidem*, p. 16.

[112] A. Pacciardi, J. Berndtsson, *European Externalization and Security Outsourcing in North Africa*, Externalizing Asylum, available at: https://externalizingasylum.info/european-externalization-and-security-outsourcing-in-north-africa/#_ftn12 (accessed 30 June 2025).

[113] J. Moorsel, A. Bonfiglio, *A Conscious Coupling: The EU-Egypt's Strategic and Comprehensive Partnership*, Mixed Migration Centre, 29 April 2024, available at: https://mixedmigration.org/eu-egypt-partnership/ (accessed 30 June 2025).

[114] El-Sayed, *The Elusive "Collectivised Refugee Protection": The Case of the EU-Egypt Migration Cooperation*, 26 European Journal of Migration and Law 241 (2024).

[115] *EU Support on Migration in Libya – EU Emergency Trust Fund for Africa – North Africa Window*, European Commission, March 2022, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf (accessed 30 June 2025).

cooperation and the commitment of EUR 65 million (2021–2027),[116] with the majority of these funds aimed at preventing departures, intercepting migrants at sea and returning them to Libyan territory.[117] Although there was a notable 90% (approximate) decrease in migrants arriving in Italy from Libya directly after signing the MoU, other entry routes were soon increasingly being used, and within three years migration from Libya had risen again as other groups supported and established new routes in the eastern part of the country.[118] Once again, the effectiveness of this agreement was temporary at best, only managing to divert the migratory flow. Furthermore, regarding human rights, asylum and non-refoulement, it is evidently ineffective[119] due to documented human rights abuses in Libya and suspicions that migration management is carried out by local militias and organised groups involved in migrant smuggling and human trafficking.[120] All this MoU manages to do is avoid the international responsibility of EU MSs, as migrants never actually come under their jurisdiction.[121]

The cooperation with Morocco dates from 2004, and EUR 2.1 billion has been allocated for multiple purposes,[122] although an agreement was not signed until 2023. Within migration, the focus remains on security, border management, anti-smuggling support and facilitated returns.[123] A key factor in securing cooperation from Morocco was the EU's support for their claim on Western Sahara.[124] The agreement's effectiveness is limited, as migrant numbers fluctuate depending on the measures affecting other routes; additionally, the EU's actions have inadvertently supported

[116] A. De Leo, *The Court of Crotone on the Libyan Coast Guard: Interception and Returns to Libya Are Not Rescue Operations. Will It Be Enough to Stop EU Funding?*, Review of European Administrative Law Blog, 27 September 2024, available at: https://tinyurl.com/3vasbb6c (accessed 30 June 2025).

[117] Pacciardi, Berndtsson, *supra* note 112, p. 4010ff.

[118] *See* Martini, Megerisi, *supra* note 74, p. 14 with figures denoting arrivals in Italy by sea.

[119] De Leo, *supra* note 116, discussing a judicial decision regarding the impossibility of Libya performing search and rescue operations and, consequently, that the "EU support to Libyan border management authorities [is] structurally unable to reach the stated objective, and thus, from this perspective, irremediably uneffective" [*sic*], also considering the *principle of sound financial management*.

[120] Achilli, *supra* note 54, p. 5051.

[121] For more detail, *see* Cardoso, *supra* note 53, pp. 515–516. The indirect responsibility of the MSs is theorised in Elserafy, *supra* note 38, p. 59. On the responsibility of MSs and Frontex, which has recently gained relevance, *see e.g.* C. Costello, I. Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21(3) German Law Journal 311 (2020).

[122] *EU Migration Support in Morocco*, European Commission, February 2023, available at: https://tinyurl.com/256tjtpm (accessed 30 June 2025).

[123] *See* L. den Hertog, *EU and German External Migration Policies: The Case of Morocco*, Centre for European Policy Studies, Bruxelles, pp. 21f., available at: https://ma.boell.org/fr/2018/03/19/eu-and-german-external-migration-policies-case-morocco (accessed 30 June 2025).

[124] Pacciardi, Berndtsson, *supra* note 112.

Morocco's autocratic regime instead of promoting democracy in the country, which highlights its ineffectiveness in aligning with European values.[125]

The EU reached an agreement with Mauritania in March 2024, designed to boost the country's capacity to handle asylum requests, reduce irregular migration and improve border management. EUR 12.5 million was allocated for this purpose (for the period 2022–2027).[126] As it is so recent, conclusive data on its effectiveness is still unavailable.

A new form of externalisation is now observable in the Italian approach with Albania. Although only indirectly concerning the EU, it has not yet been met with its disapproval. Italy's idea was to externalise asylum requests: eligible (not vulnerable) migrants will be redirected to a processing centre in Albania, to submit their applications. People granted asylum would then be brought to Italy, while rejected applicants would be removed from Albania and returned. The arrangement preserves Italian jurisdiction: "applications will be processed by Italian officials using Italian and EU legislation, and Italian judges will be responsible for handling disputes",[127] which may be problematic concerning the extraterritorial application of EU law and constitutional issues in Albania, where foreign law is exclusively applied in part of the territory.[128] The effectiveness of this agreement was not off to a great start: an Italian judge declared it inadmissible the first time it was to be applied, and migrants were brought to Italy instead.[129] But other issues are likely to emerge, such as establishing who is responsible for upholding human rights standards or where refugees will be removed to if they are denied asylum.[130] The Italian centres in Albania are estimated to cost EUR 653 million over five years.[131]

[125] For an analysis, *see* L.F. Torres, *Hindering Democracy through Migration Policies? An Analysis of EU External Migration Policies' Impacts on the Democratisation of Morocco*, in: R. Zapata-Barrero, I. Awad (eds.), *Migrations in the Mediterranean*, Springer, Cham: 2023, pp. 29ff.

[126] R. Phillips, *EU Signs Controversial Migration Agreements in Africa*, InfoMigrants, 21 May 2024, available at: https://www.infomigrants.net/en/post/57175/eu-signs-controversial-migration-agreements-in-africa (accessed 30 June 2025).

[127] L. Piccoli, *No Model for Others to Follow. Offshoring Asylum the Italian Way*, Verfassungsblog, 14 November 2023, available at: https://verfassungsblog.de/offshoring-asylum-the-italian-way/ (accessed 30 June 2025).

[128] Analysis in R. Bushati, E. Furramani, *Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows*, 10(3) Journal of Liberty and International Affairs 28 (2024). The problematic nature of these processes has been highlighted by the UN Human Rights Committee, albeit concerning Australia – *Australia Responsible for Arbitrary Detention of Asylum Seekers in Offshore Facilities*, United Nations, 9 January 2025, available at: https://www.ohchr.org/en/press-releases/2025/01/australia-responsible-arbitrary-detention-asylum-seekers-offshore-facilities (accessed 30 June 2025).

[129] A. De Leo, *Op-ed: Does the Rome Court's Refusal to Validate the Detention Order of the First Asylum Seekers Brought to Albania Mark the End of the Italy-Albania Deal?*, European Council on Refugees and Exiles, 24 October 2024, available at: https://tinyurl.com/edzm6njx (accessed 30 June 2025).

[130] *See* Piccoli, *supra* note 127.

[131] *Italy-Albania Asylum-Seeker Deal to Cost €653 Million, Report Finds*, InfoMigrants, 23 April 2024, available at: https://www.infomigrants.net/en/post/56618/italyalbania-asylumseeker-deal-to-cost-%E2%82%AC653-million-report-finds (accessed 30 June 2025).

4.2. An overall assessment of the effectiveness of externalisation

While each agreement has been individually analysed, their overall effectiveness must include the number of returns performed, which depends on the clauses in each agreement[132] and lists of safe countries. While return rates include all types of irregularity, be it upon arrival at the borders or arising subsequently, combining data on returns and asylum applications still offers the most meaningful metric for evaluating the effectiveness of this dimension of the externalisation policy. Unlike readmission agreements, which focus exclusively on cooperation with third countries, these policies address broader mechanisms involving both asylum management and return procedures, which are reflected in the trends in asylum claims and return rates

Table 4. Third country nationals returned, by MS

Country/ Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Belgium	5,250	5,550	6,920	5,880	4,585	3,940	2,675	2,655	1,940	1,960	**41,355**
Bulgaria	1,090	540	1,105	1,250	610	595	230	520	515	510	**6,965**
Czechia	315	330	390	680	720	580	885	560	525	570	**5,555**
Denmark	910	1,040	930	1,115	1,165	1,460	725	980	930	1,390	**10,645**
Germany	19,060	53,640	74,080	44,960	29,055	25,140	12,265	8,195	7,730	10,290	**284,415**
Estonia	100	40	380	580	710	1,050	995	1,060	1,030	945	**6,890**
Ireland	335	205	245	270	310	470	325	160	190	285	**2,795**
Greece	27,055	14,390	19,055	18,060	12,465	9,650	6,950	6,855	6,985	5,820	**127,285**
Spain	14,155	12,235	9,530	10,165	11,800	11,525	4,855	3,230	3,335	5,995	**86,825**
France	13,030	12,195	10,930	12,720	15,445	15,615	6,930	6,290	8,640	10,625	**112,420**
Croatia	2,150	1,405	1,720	1,980	2,165	2,390	1,425	2,040	3,665	6,745	**25,685**
Italy	5,310	4,670	5,715	7,045	5,615	6,470	2,815	975	2,790	3,275	**44,680**
Cyprus	2,985	1,840	1,035	760	730	455	1,060	2,165	4,205	7,775	**23,010**
Latvia	1,550	1,030	1,355	1,275	1,465	1,565	910	765	1,745	2,020	**13,680**
Lithuania	1,925	1,685	1,545	1,860	2,110	2,015	1,590	:	2,410	3,425	**18,565**
Luxembourg	605	720	405	435	275	270	160	155	155	230	**3,410**
Hungary	3,440	5,755	780	685	875	810	995	1,495	965	1,140	**16,940**
Malta	495	465	420	470	530	600	380	710	665	920	**5,655**

[132] The European Parliament considered that "in order to increase the efficiency of readmissions [...] it will be necessary to adopt new EU readmission agreements" – European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), 15 February 2018, OJ C 58/9.

Country/ Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Netherlands	7,655	8,385	11,890	8,195	8,830	11,055	8,715	2,540	975	1,555	**69,795**
Austria	:	:	5,895	5,715	6,805	6,800	4,610	4,480	5,260	6,780	**46,345**
Poland	9,000	12,750	18,530	22,165	25,700	25,895	870	6,355	4,575	6,880	**132,720**
Portugal	760	565	370	310	280	465	470	265	595	370	**4,450**
Romania	2,085	1,995	1,865	1,815	1,705	2,355	1,725	1,655	2,610	2,700	**20,510**
Slovenia	150	155	205	120	150	155	125	135	170	75	**1,440**
Slovakia	655	970	1,390	1,725	2,095	1,580	410	370	235	265	**9,695**
Finland	2,855	2,980	5,610	3,565	2,850	2,990	2,200	1,070	960	1,240	**26,320**
Sweden	6,230	9,695	10,160	6,845	6,850	6,425	4,930	6,805	8,615	7,670	**74,225**
Total	**129,150**	**155,230**	**192,455**	**160,645**	**145,895**	**142,320**	**70,225**	**62,485**	**72,415**	**91,455**	

Table 4, as anticipated, illustrates that countries receiving a significant number of asylum applications (see Figure 2) also exhibit higher return rates. Comparing these figures offers key insights, as most migrants arriving irregularly are asylum seekers lacking the legal means to reach Europe. For example, Germany returned nearly 11% of asylum seekers between 2014 and 2023, similar to France, while in Greece, about 31% of asylum applicants were returned, and in Poland the dependence is even reversed – 132,720 third-country nationals were returned, compared to 56,990 first-time asylum applicants.[133]

It could be preliminarily assumed that border MSs would likely have higher return rates, as the migratory flow going through them is larger than in countries in the EU's geographic centre, but attractive pull factors in central MSs like Germany draw migrants there.

Regarding the benchmark for effectiveness, this aspect of externalisation seems to fare no better. There is some correlation between the number of arrivals and returns,[134] which is expected. However, the relationship between the number of agreements with third countries and returns is unclear; otherwise, a substantial increase in returns would be expected as more deals with such clauses are signed, which does not appear to be the case. This results partly from the legal framework:

[133] Poland's case illustrates the pitfalls of this method, as it would be difficult to return more asylum seekers than it receives. However, as official statistics do not differentiate the number of returns by category according to the motive for the return, there is no other way to assess effectiveness in this area.

[134] The lower-than-expected numbers may also be attributed to various factors that prevent returns, leading to misreading of the data, including pending asylum proceedings, difficulties in determining the person's nationality or insufficient resources for performing all returns – S. Carrera, J. Allsopp, *The Irregular Immigration Policy Conundrum: Problematizing 'Effectiveness' as a Frame for EU Criminalization and Expulsion Policies*", in: A. Ripoll Servent, F. Trauner (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, London: 2017, pp. 74–75 with statistics.

migrants who cannot remain in the EU must be returned either to their country of origin – which can be challenging due to forged or non-existent documentation – or to the country from which they came if there are readmission agreements. Either way, this is only feasible if those countries are deemed safe, depending not only on existing agreements,[135] but also on a judicial assessment of their reception conditions.

The concept of a "safe country", as defined in Annex I and Art. 38 of Directive 2013/32/EU, entails that "there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict". MSs can designate safe countries of origin for returns, but must assess them regularly (Art. 37). It is currently impossible to designate only *parts* of a country as safe, or to designate them as safe for *groups* of people[136] – this was also stated by the CJEU, who clarified that the national court must assess the safety of the country on its own, even if the individual concerned does not raise the issue.[137]

The implications of this designation include the possibility of a much speedier return and difficulty in proving that the country is actually *un*safe.[138] The quantitative effectiveness of such arrangements is consequently higher: when almost all arriving migrants are successfully returned, it has a deterrent effect on aspiring migrants.[139] In Europe the rates are lower, given the reluctance of third states to act as "dumping-ground" for Europe's unwanted migrants; however, this designation does not allow the returning country to immediately consider asylum requests inadmissible, if the receiving country refuses readmission[140] (as Türkiye has done with Greece). Nevertheless, it appears that a country being democratic bears little influence over the number of returns.[141]

[135] Although these prove ineffective as well, as states are typically unwilling to accept readmissions – *see* I. Avelas, A. Bosman, *A Rare Win: Greek Asylum Practices Before the CJEU*, Verfassungsblog, 19 November 2024, available at: https://verfassungsblog.de/a-rare-win/ (accessed 30 June 2025).

[136] Although it will again be possible to do so with the new rules on asylum, which once again strive for maximal returns – S. Peers, *"Safe Countries of Origin" in Asylum Law: The CJEU First Interprets the Concept*, EU Law Analysis, 14 October 2024, available at: https://eulawanalysis.blogspot.com/2024/10/safe-countries-of-origin-in-asylum-law.html (accessed 30 June 2025).

[137] Case C-406/22 *CV v. Ministerstvo vnitra České republiky*, EU:C:2024:841.

[138] A. Pirrello, *Paesi di origine: sicuri che siano sicuri?*, ADiM Blog, 30 July 2024, available at: https://www.adimblog.com/2024/07/30/paesi-di-origine-sicuri-che-siano-sicuri/ (accessed 30 June 2025).

[139] At a huge human rights cost, however – see the example of Australia, discussed in D. Thym, *Safe Third Countries: The Next :Battlefield"*, EU Immigration and Asylum Law and Policy, 5 July 2024, available at: https://eumigrationlawblog.eu/safe-third-countries-the-next-battlefield/ (accessed 30 June 2025).

[140] Case C-134/23 *Elliniko Symvoulio*, EU:C:2024:838. For a commentary, *see* S. Peers, *Pyrrhic Victory for the Greek Government: The CJEU Rules on Turkey as a "Safe Third Country"*, EU Law Analysis, 11 October 2024, available at: https://eulawanalysis.blogspot.com/2024/10/pyrrhic-victory-for-greek-government.html (accessed 30 June 2025).

[141] As concluded by P. Stutz and F. Trauner – P. Stutz, F. Trauner, *Democracy Matters (To Some Extent): Autocracies, Democracies and the Forced Return of Migrants from the EU*, 30(2) Geopolitics 704 (2024).

While this phenomenon is not exclusively European,[142] it unquestionably results in the violation of human and fundamental rights of the people who wish to leave a country, while seldom holding accountable those performing or condoning such violations.[143] The same is true for pushback operations,[144] which are internationally condemned and can lead to sanctions,[145] thus bringing into question their effectiveness as well (particularly regarding human rights, but also their rationale, as states are aware of their potential accountability).

Externalisation has brought some successes, such as improvements in third countries,[146] but the numerous problems it has exacerbated or created are hardly justified by the meagre results.[147] From human rights issues through third countries' refusal to comply with the EU's bidding (even with incentives) to the thwarting of problematic deals,[148] the drawbacks are evident to the EU – which becomes vulnerable to political pressure from third countries[149] – and to those same countries who face (and show) resistance[150] for aligning with European practices that fail to

[142] *See also* A. Pijnenburg, *Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?*, 71 Netherlands International Law Review 59 (2024)

[143] Literature on this topic is abundant – *e.g.* M. Gkliati, *Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law*, 9(1) European Papers 69 (2024); and the articles by E. Guild, *Frontex and Access to Justice: The Need for Effective Monitoring Mechanisms*, 30(1–2) European Law Journal 136 (2024); L. Marin, *Frontex at the Epicentre of a Rule of Law Crisis at the External Borders of the EU*, 30(1–2) European Law Journal 11 (2024); S.F. Nicolosi, *The European Border and Coast Guard Agency (Frontex) and the Limits to Effective Judicial Protection in European Union Law*, 30(1–2) European Law Journal 149 (2024); or J. Rijpma, *Watching the Guards: Ensuring Compliance with Fundamental Rights at the External Borders*, 30(1–2) European Law Journal 74 (2024).

[144] The collective expulsion of aliens without conducting individual assessments of their asylum claims. Commenting the situation in Latvia, Lithuania and Poland (Ancite-Jepifánova, *supra* note 44, pp. 9ff. But *see* S. Ganty, A. Ancite-Jepifánova, D. Kochenov, *EU Lawlessness Law at the EU–Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"*, 16 Hague Journal on the Rule of Law 739 (2024).

[145] *See e.g.* ECtHR, *M.A. and Z.R. v. Cyprus* (App. No. 39090/20), 8 October 2024; or ECtHR, *M.D. and Others v. Hungary* (App. No. 60778/19), 19 September 2024. Nevertheless, attributing responsibility to European states can be difficult – in an effort to avoid this externalisation effect, see the proposal for reframing jurisdictional control accounting for technological developments in A. Papachristodoulou, *The Exercise of State Power over Migrants at Sea through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction*, 73(4) International & Comparative Law Quarterly 931 (2024).

[146] Ovacık, Ineli-Ciger, Ulusoy, *supra* note 105, p. 147.

[147] Although irregular arrivals had temporarily declined, they are evidently rising again, notwithstanding the new agreements and measures in place. *See* Martini, Megerisi, *supra* note 74, p. 9; *see also* A. Dimitrov, V. Pavlov, *EU-Third Countries Cooperation in Managing Irregular Migration*, 7(2) International Scientific Journal Security & Future 46 (2023).

[148] It was also clear by the backlash to the UK-Rwanda deal – F. Zanker, *Outsourcing Asylum to African States? An Endeavour Destined to Fail*, Externalizing Asylum, available at: https://externalizingasylum.info/outsourcing-asylum-to-african-states-an-endeavour-destined-to-fail/ (accessed 30 June 2025).

[149] The example of Belarus is telling, as is the Turkish threat to allow migrants to enter Europe if the EU condemned the incursion into Syria – in Guiraudon, *supra* note 97, p. 155; *see also* Martini, Megerisi, *supra* note 74, p. 8.

[150] Ovacık, Ineli-Ciger, Ulusoy, *supra* note 105, p. 149.

account for their interests[151] and strongly resemble colonialism. The huge amounts of money[152] invested are also counterproductive: the more third countries observe how much they can profit, the more the externalisation market grows, as migrants who were once absorbed by those countries are now "commoditised"[153] by them. That irregular migrants in need will still come, despite irrational, undemocratic measures, is easily evidenced by the number of arrivals: although they do not yet rival those of 2015–2016, they are steeply rising again. These conclusions raise an important question: should "effectiveness" not mean the effective management of migration in a sensible approach to the future?

5. FINAL CONCLUSIONS AND THE WAY FORWARD

This analysis, encompassing multiple facets of effectiveness, demonstrates that the EU's approach to migration is not effective: the number of irregular migrants arriving is not abating, and when it does diminish it is a temporary consequence of repressive measures that fail to have a lasting effect, as they are soon circumvented. These measures are also ineffective because they divert resources towards low-risk, low-harm conduct, rather than targeting actual criminal behaviour, thus compromising (instead of ensuring) border security. Additionally, they are ineffective in terms of migrants' rights, international obligations and European values, as violations (even if "indirect") keep occurring with at least the EU's silent approval. Finally, regarding the power shift they entail, EU border security is increasingly handed over to third states, who cooperate only to further their own objectives. This undermines the EU's mission to promote peace and its values (Art. 3(1) TEU), as it funds (and thus perpetuates) undemocratic regimes.

The adoption of short-term measures in response to "crises"[154] is still evident. Focusing solely on the number of migrants kept at bay or returned overlooks the possibility of remigration, due to a lack of means of subsistence within their communities – or in unfamiliar states that have agreed to accept them, but where they have no ties and slim chances for integration. Harsh reception conditions[155] are

[151] A. De Leo, E. Milazzo, *Responsibility-Sharing or Shifting? Implications of the New Pact for Future EU Cooperation with Third Countries*, Policy Study, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels: 2024.

[152] For an interesting account, *see Outsourcing Borders: Monitoring EU Externalisation Policy*, Statewatch, 3 July 2024, available at: https://www.statewatch.org/outsourcing-borders-monitoring-eu-externalisation-policy/ (accessed 30 June 2025).

[153] Martini, Megerisi, *supra* note 74, p. 30.

[154] A. Geddes, *Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards*, in: S. Carrera, D. Curtin, A. Geddes (eds.), *20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, European University Institute, Florence: 2020, pp. 8ff.

[155] As documented in France and the UK (*see* Carrera, Allsopp, *supra* note 134, p. 78).

also ineffective and serve only to further marginalise migrants and increase societal perceptions of insecurity. Instead of pivoting "towards the status quo",[156] regarding migrants as problems and investing in more repressive measures[157] or failed policies, a radical shift in perspective is needed – one that considers the *full, complex* phenomenon of migration and invests in measures complying with values and the integration of migrants, in order to prevent bias against them.[158] In addition to improving the human rights situation,[159] the most logical approach would be to invest European funds in a twofold manner: firstly, in the root causes of migration rather than in repressive control measures that have no benefits and little to no effectiveness; secondly, in the effective integration of migrants into European society and its values, especially considering labour needs. This investment would also withstand a more rigorous audit of European resources.[160]

To support these conclusions, data shows the beneficial fiscal impact of migrants in the destination country,[161] while the cost of integration[162] would require less investment than what is currently put into securitisation measures that do not work. While this would not solve Europe's population issues,[163] a simple cost-ben-

[156] Czaika, Bohnet, Zardo, Bujak, *supra* note 14, p. ii.

[157] *Ibidem*, p. 14ff: insisting on the same measures can be an effort to avoid "very high economic or political-reputational costs", as changing policies would imply admitting that the previous measures were ineffective.

[158] Bijak, de Vilhena, Potančoková, *supra* note 11, p. 14. It would also be important in preventing radicalisation – see the results of the IN2PREV project *Advancing Cross-sectoral Collaboration for Refugee Integration and Radicalisation Prevention*, Prisions System, 2 January 2025, available at: https://prisonsystems.eu/advancing-cross-sectoral-collaboration-for-refugee-integration-and-radicalisation-prevention/ (accessed 30 June 2025).

[159] A. Chatzigianni, K. Nikolopouloup, *At Europe's Borders: Between Impunity and Criminalization*, Greek Council for Refugees, Athina: 2023, p. 48. De Leo, *supra* note 129, suggests investing in more efficient asylum systems and regularisation mechanisms that would effectively curb irregular means of arrival.

[160] In response to the deserved criticism of De Leo, *supra* note 116.

[161] According to a Professor of Economics in the UK: "Without immigration, the numbers of people paying tax will shrink just as the numbers needing state support in later life are growing. It's not a sustainable mix." – J. Portes, *The Big Idea: Why We're Getting the Immigration Debate All Wrong*, The Guardian, 2 September 2024, available at: https://www.theguardian.com/books/article/2024/sep/02/the-big-idea-why-were-getting-the-immigration-debate-all-wrong (accessed 30 June 2025). That assessment seems to be proven by a study concluding that "higher net migration leads to lower deficits and debt, because migrants tend to be of working age" – C. Vargas-Silva, M. Sumption, B. Brindle, *The Fiscal Impact of Immigration in the UK*, The Migration Observatory, 25 October 2024, available at: https://migrationobservatory.ox.ac.uk/resources/briefings/the-fiscal-impact-of-immigration-in-the-uk/ (accessed 30 June 2025).

[162] These costs are more difficult to prove, but in Case C-158/23 *Keren*, EU:C:2024:461, the concerned person contracted a EUR 10,000 loan to finance the costs of civic integration. This is corroborated by an OECD Report from 2017, which also highlights that they are initially higher, but "decline considerably in the following years", *Who Bears the Cost of Integrating Refugees?*, OECD, 10 January 2017, available at: https://www.oecd.org/en/publications/who-bears-the-cost-of-integrating-refugees-s_746b49ef-en.html (accessed 30 June 2025).

[163] Any lasting consequences would demand sustained immigration (Bijak, de Vilhena, Potančoková, *supra* note 11, pp. 23–25).

efit analysis demonstrates that such an investment would have a beneficial return in (the near) future,[164] proving a sounder investment than measures with zero economic return. It would also be indisputably more effective in dispelling the prevailing negative bias and marginalisation of migrants,[165] allowing for a positive view of migration to resurge.

Additionally, migrant smuggling could be construed as a legitimate criminal offence, and by redirecting the justice system's efforts towards the real crime, the inadequate resource allocation would be resolved. Concurrently, providing legal pathways for people needing to migrate to Europe would effectively dwindle the business of migrant smuggling,[166] as it would no longer be profitable due to decreased demand. Addressing the root causes of migration and supporting economies and democracies in third countries would also ensure that people would not *want* to migrate, reducing the phenomenon even further. In conclusion, a new approach to migration is urgently needed.

[164] While MSs bear some costs, they also receive European funds for migrants' integration: Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund [2021] OJ L 251/1.

[165] See the arguments and conclusions by A. Dimitrov, *Refugee Employment in Bulgaria: Why National Integration Policy Matters*, 18 Economy & Business 97 (2024).

[166] Criticism in Parliamentary Assembly of the Council of Europe, Report 15963 (2024), *A Shared European Approach to Address Migrant Smuggling*, p. 16.

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ESCAPING INTO ECONOMIC SECURITY: HOW CAN THE EUROPEAN UNION USE FOREIGN DIRECT INVESTMENT SCREENING IN TIMES OF CRISIS? LESSONS FROM THE UNITED STATES[1]

Abstract: *The rapid transformation of the international economic order from a liberal arrangement of economic interdependencies to a geoeconomic competition between states changed attitudes regarding foreign investment. This arguably protectionist turn toward national security is an attempt to safeguard against multidimensional consequences of crises. To protect the EU's strategic autonomy, Regulation 2019/452 came into force in 2019, laying the foundations for the European Foreign Investment Screening framework. Soon afterwards, FDI screening served as an instrument in the EU's policy for addressing and mitigating risks rapidly arising from an international crisis: the COVID-19 pandemic. This experience influenced another recent measure – the European Economic Security Strategy (EESS) – together with the proposal for the New FDI Screening Regulation.*

This article argues that the experience of the COVID-19 crisis inspired dualistic changes in FDI screening, transforming it into a protector of European economic security. The EESS and the proposal for the New FDI Screening Regulation are juxtaposed against the United States's experience in controlling FDI for the aim of assessing FDI screening as a tool for safeguarding European economic security in light of the EU's inexperience in the matter.

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Keywords: economic security, COVID-19 pandemic, FDI screening, European Economic Security Strategy, national security review

INTRODUCTION

The rapid transformation of the international economic order, from a liberal arrangement of deep economic interdependencies to a geoeconomic competition between states – fueled by a rising fear of foreign control over crucial economic sectors – changed states' attitude toward foreign investment. Even though the vast economic benefits of limitless foreign investment flows are not disputed, states more and more often prioritize the threats related to national security which can arise from them. This protectionist, as some argue, turn to national security is an attempt to safeguard and shield from the cross-sectorial consequences of crises. Nowadays, states reshape their domestic laws to reflect the new, challenging economic reality. At the behest of fear centered on national security, trade and investment laws are tightened to mirror the state's geopolitical shift. Laws relating to foreign investment are amended for the purpose of gaining more control over investment within the state's territory. States thereby strive to benefit from "safe foreign investment," in accordance with their individual definitions of national security.

1. FOREIGN INVESTMENT SCREENING IN THE EUROPEAN UNION – A BRIEF BACKGROUND

This phenomenon is also present in the European Union (EU). As a tool for safeguarding its strategic autonomy, Regulation 2019/452 came into force in 2019, laying the foundations for the European Foreign Investment Screening framework (FDI screening).[2] In this regard, the EU followed in the footsteps of the G7 countries. In fact, the EU's FDI screening framework was introduced relatively late compared to some of them, including its Member States (MSs), which were pioneers in controlling inward foreign investment on national security grounds in Europe. Germany, Italy and France had their domestic FDI screening regimes long before that idea emerged at the European level. Soon after the EU FDI screening framework took effect, foreign direct investment screening served as an instrument

[2] For a similar view that FDI screening is a tool aimed at protecting the EU's strategic autonomy, *see* S. Robert, *Foreign Investment Control Procedures as a Tool for Enforcing EU Strategic Autonomy*, 8(2) European Papers 513 (2023). The EU's strategic autonomy, however, is not to be associated with protectionism. *See* C. Alcidi, T. Kiss-Gálfalvi, D. Postica, E. Righetti, V. Rizos, F. Shamsfakh,, *What Ways and Means for a Real Strategic Autonomy of the EU in the Economic Field? Final Report*, Centre for European Policy Studies, Brussels, 2023, p. 16. *See also* J. Hillebrand Pohl, *Strategic Autonomy as a Means to Counter Protectionism*, 22 ERA Forum 183 (2021), in which EU strategic autonomy is considered "protection against protectionism".

in the EU's policy for addressing and mitigating the risks that were rapidly arising from an international crisis: the COVID-19 pandemic.[3] Based on its experience of using FDI in times of crisis, in 2023 the EU issued another measure with a similar objective: the European Economic Security Strategy (EESS). This measure offers a comprehensive framework of tools that may prove useful in future crises faced collectively by the Union, partially relying on the MSs' domestic mechanisms. Thus, FDI screening was framed in a new context and gained a new purpose. Apart from protecting the public security of the MSs, it was now tailored to protect European economic security. The new measure, though partially based on the existing mechanism, represents the Union's shift from openness to protectionism, as well as an important step in the protection of its collective security (European security) from FDI-related threats.[4]

1.1. Research problem and its significance

The inclusion of FDI screening in the EESS challenged the original nature of the mechanism. The old MS-centered tool is now intended to protect a collective European interest. Public security gives way to economic security. The suitability and effectiveness of FDI screening in addressing crises through protecting European economic security is thus unknown. The need and intention to protect economic security through FDI screening creates a challenge not yet faced by the EU or part of its political and legal practice. Furthermore, as FDI screening is at the heart of the EESS, its effectiveness in addressing crises in the new context is fundamental for the protection of European economic security, as well as for the effectiveness of the Strategy as a whole.

For these reasons, it can be helpful to root the EU's new application of FDI screening in the context of other states' experience in the matter. For this purpose, the long experience of the United States (US) in using foreign investment screening for the protection of economic security is presented. This article's aim is to juxtapose the EESS and its new FDI Screening Regulation against the US's experience for the purpose of assessing FDI screening as a tool for safeguarding European economic security.

[3] It should be additionally noted that FDI screening was a crucial tool in dealing with the consequences of yet another crisis-inducing event: the Russian aggression against Ukraine in 2022. The EU's response to the war in Ukraine was an important step in the shaping of the new purpose of FDI screening – an instrument to protect collective European interests. However, due to word count restrictions, and to maintain consistency and due diligence, the Russian aggression against Ukraine and the related response from the EU will not be covered in this article.

[4] The term "European security" is used to describe the security of the EU as a whole and the collective security of the MSs. It thus pertains to public security and does not include economic or any other kind of security, such as energy security. Equally, the term "European security interests" is refers to the security interests of the Union as a whole or the collective security interests of the MSs. Both terms are therefore synonymous. When a statement is limited to economic security, the paper uses the term "European economic security."

1.2. Structure, assumptions and limitations

The article initially briefly denotes how, under EU Regulation 2019/452, FDI screening's primary aim was to protect MSs' public security. Then it demonstrates that the EU's experience of a crisis inspired dualistic changes in the nature of FDI screening, as the COVID-19 pandemic enabled European security interests to be protected by the MSs' domestic FDI screening mechanisms. A crisis-induced transformation of FDI screening is analyzed subsequently in light of the COVID-19 pandemic. Both subjective and objective changes of the mechanism's nature are portrayed since, due to this crisis, the MSs' domestic screening mechanisms have begun to protect European security. This is based on the European Commission's Guidance concerning foreign direct investment and free movement of capital from third countries, as well as the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452. The transformed scope of the FDI screening argument would subsequently lead to claims that, based on the EESS, the EU aims to protect European economic security. The EESS is analyzed in the context of how FDI screening was transformed into a protective mechanism for European economic security. An analysis of the Commission's Proposal for a New FDI Screening Regulation is also included, with a particular emphasis on the planned interference in MSs' competences for protecting their essential security interests. Lastly, the US's experience in protecting economic security with FDI screening is presented. The US perspective is used to offer remarks as to the future application of the EU's FDI screening for safeguarding European economic security.

This article assumes that the EESS can be and is meant to be used in times of crisis, possibly induced by FDI-generated threats. Furthermore, the paper has the following limitations. The definition and interpretation of public security in the context of the EU, as well as of national security in the context of the US are not analyzed. Similarly, in both contexts, the definition of economic security is not subject to consideration. Lastly, as the paper is centered around security, the criterion of the public order as grounds for FDI screening, as specified in EU Regulation 2019/452, is not discussed. The analysis is limited solely to public security.

2. EU'S EXPERIENCE OF CRISIS AS AN INSPIRATION FOR DUALISTIC CHANGES TO THE FDI SCREENING MECHANISM

In 2019, the EU's foreign direct investment screening framework came into effect. Preceded by the domestic legislation of several MSs, this mechanism was aimed at addressing and mitigating diverse threats arising from foreign direct investment. Regulation 2019/452 primarily provided an enabling framework for MSs to screen foreign direct investment on the basis of public security, but it also equipped the

Commission with the competence to control foreign investment that is potentially detrimental to the EU's programs and projects.[5] Even though the new FDI screening mechanism was ultimately calibrated to protect primarily the national security interests of the MSs, it soon was effectively used by the Commission to protect against crises threatening the MSs collectively. FDI screening played an important part in addressing, at the European level, a major recent crisis: the COVID-19 pandemic in 2020. This crisis inspired profound changes in the EU's FDI screening mechanism, in both its subjective and objective scopes. Even though the legal text of Regulation 2019/452 remained unchanged, the dualistic transformation of the EU's screening mechanism constituted a founding pillar that subsequently enabled the protection of European economic security through the EESS in 2024. COVID-19 revealed that FDI can threaten not only the public security of the MSs, but also European security. According to the Commission, such threats included a "risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment."[6] This part of the article aims to demonstrate the two-stage path the FDI screening mechanism took from a MS-centered and public-security-protective measure to a European-at-heart mechanism safeguarding the Union's economic security. The aim is to indicate that the experience of a crisis caused a dualistic change in the nature of FDI screening. The subjective and objective changes to the scope of FDI screening is analyzed in the context of the crises that have inspired and triggered them. Through a brief portrait of Regulation 2019/452, the initial part of this section sets the contexts for the subsequent analysis, as it depicts EU FDI screening as a mechanism that primarily serves the public security interests of the MSs.

2.1. Pre-pandemic regulatory framework – original FDI screening as an instrument to protect the public security interests of the MSs

Regulation 2019/452, constituting a legislative basis for the EU's FDI screening framework, was adopted on 19 March 2019.[7] The mechanism entered into force

[5] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*, Brussels, 13 September 2017 COM(2017) 487 final (Proposal for Regulation 2019/452).

[6] Communication from the Commission, *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452* [2020] OJ C 991/1 (COVID-19 Guidance). The MSs' expected response was not limited to the health care industry.

[7] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79 I/1.

in April 2019, with its full application set for 11 October 2020. The European Commission had realized the necessity of gaining control over foreign direct investment within the Union's territory two years earlier, as the Regulation Proposal was issued in 2017. The Proposal's issuance marks a turning point in the Commission's attitude toward foreign investment control mechanisms, as it continuously upheld its rather anti-regulatory position despite numerous warnings.[8] The Commission rejected proposals for a common European screening mechanism, including an establishment of an EU committee on foreign investments that would imitate the Committee on Foreign Investment in the United States (CFIUS).[9] The justification relied mainly on the argument that the MSs as well as the Union already possessed sufficient measures to protect against threats arising from foreign investment.[10] The Commission was very hesitant toward foreign investment control mechanisms "based on too broad a notion of 'national security', especially when covering economic grounds."[11] Even though the European economic landscape underwent significant changes, mainly because of the rapid growth of Chinese investment, this reluctancy remained dominant in both the Commission's narrative and legislative

[8] Foreign investment sparked EU-wide concerns as early as in 2008, when investments made by sovereign wealth funds (SWFs) grew rapidly. *See* J. de Kok, *Towards a European Framework for Foreign Investment Reviews*, 44(1) European Law Review 24 (2019), p. 8. Investments carried out by state-owned and state-funded SWFs raised concerns regarding the functioning of market economies – though evidently not severe enough, as the European Commission decided not to take any action at the European level. *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 February 2008, *A common European approach to sovereign wealth funds*, COM(2008) 115 final, pp. 3–4 (Communication on the SWFs); A. de Luca, *The EU and Member States: FDI, Portfolio investments, golden powers and SWFs*, in: F. Bassan (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Edward Elgar Publishing, Cheltenham: 2015. A few years later the Commission rejected criticism raised by Antonio Tajani and Michel Bernier, who urged for higher scrutiny over Chinese direct investment rapidly emerging in Europe. Again, even though potential threats arising from Chinese foreign investments were acknowledged by senior EU officials, no action was taken to address them (de Kok, *supra* note 8). For more on EU FDI screening regulation, *see generally* J. Velten, *The Investment Screening Regulation and its Screening Ground "Security or Public Order": How the WTO Law Understanding Undermines the Regulation's Objectives*, CTEI Working Papers 2020/1; T. Verellen, *When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation*, 48(1) Legal Issues of Economic Integration 19 (2021); *Framework for Screening Foreign Direct Investment into the EU: Assessing Effectiveness and Efficiency*, OECD Publishing, Paris: 2022.

[9] Communication on the SWFs, p. 7; H. Schweitzer, *Sovereign Wealth Funds: Market Investors or "Imperialist Capitalists"? The European Response to Direct Investment by Non-EU State-Controlled Entities*, n: Ch. Herrmann, J.P. Terhechte (eds.), *European Yearbook of International Economic Law*, Springer, London: 2011, p. 94.

[10] Communication on the SWFs, pp. 6–8; A. de Luca, *The EU and Member States: FDI, Portfolio investments, golden powers and SWFs*, in: F. Bassan (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Edward Elgar Publishing, Cheltenham: 2015, p. 183; F. Godement, J. Parello-Plesner, A. Richard, *Policy Brief: The Scramble for Europe*, European Council on Foreign Relations, London: 2011, p. 5.

[11] de Kok, *supra* note 8, citing A. Tajani, *Parliamentary Questions – Answer Given by Mr Tajani on Behalf of the Commission*.

actions. This anti-regulatory shell only slowly started to break in 2017, which ultimately resulted in an unprecedented step toward regulating public security threats arising from foreign investment: the Proposal for Regulation 2019/452.[12]

Even though the Commission's approach gradually changed as the share of Chinese direct investment in the EU increased, the first official step to address risks to public security arising from foreign direct investment was not taken until 2017. Although the Proposal was strongly criticized and though it is, in fact, doubtful whether it truly manifested the Commission's own change of mind – having originated as an initiative of Germany, France and Italy – its revised version unprecedently allowed for mitigating public security risks of foreign investment.[13] The final Regulation 2019/452 established an FDI screening framework which, at its core, was a protective mechanism for public security of the MSs. Protection of the Union's interests was largely limited. Even though the mechanism was established

[12] It is important to note that as early as 2016, the European Political Strategy Centre (EPSC) pointed out the need for a harmonized approach to foreign investment, as well as the possibility of implementing a common European review of foreign investment based on the US Committee on Foreign Investment (*Engaging China at a Time of Transition: Capitalizing on a New Era of Chinese Global Investment and Foreign Policy Initiatives*, 16 EPSC Strategic Notes Issue 1 (2016), available at: https://tinyurl.com/7hf3c53s (accessed 30 June 2025)). It should be further noted that the proposal for Regulation 2019/452 was not the earliest document to demonstrate the shift in the Commission's attitude towards regulating threats arising from foreign investment. It had also been manifested in the Commission's *Reflection Paper on Harnessing Globalization*, issued in early 2017. There it was confirmed that "concerns have recently been voiced about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons. [...] These concerns need careful analysis and appropriate action" (European Commission, *Reflection Paper on Harnessing Globalization*, Brussels, 10 May 2017, COM(2017) 240 final); *see also* European Commission, *White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025*, 1 March 2017, COM(2017)2025. *See also* Bismuth's interpretation of the Proposal as "surprising particularly when one recalls the sceptical – and at times reluctant – position of the Commission regarding domestic FDI screening mechanisms" (R. Bismuth, *Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU*, 3(1) European Investment Law and Arbitration Review 45 (2018), p. 46).

[13] Bismuth, *supra* note 12, p. 48. *See also* C. Esplugues, *A Future European FDI Screening System: Solution or Problem?*, 245 Columbia FDI Perspectives 1 (2019). A comprehensive analysis of the Proposal and its legislative path towards Regulation 2019/452 is outside of the article's scope. It should be emphasized, however, that the Proposal was significantly revised during negotiations with the MSs. The primary Proposal was to a much greater extent "European," as it was broadly aimed at the protection of "critical European assets against investment that would be detrimental to legitimate interests of the Union or its Member States" (*see ibidem*, p. 2). Moreover, the originally proposed FDI screening framework was a "policy response to protect legitimate interests with regard to foreign direct investments that raise concerns for security or public order of the Union or its Member States" (*see ibidem*). The originally proposed Regulation 2019/452 was thus aimed at safeguarding the security interests of the Union. For this purpose, the Proposal included competences of the Commission to "screen foreign direct investments that are likely to affect projects or programmes of Union interest on the grounds of security or public order" (*see* ibidem, Art. 3(2)). However, the Commission's efforts to protect European interests through FDI screening were ultimately rejected, as the adopted Regulation 2019/452 did not include an "independent Union level FDI Screening mechanism whenever 'Union interests' are at stake" (S.W. Schill, *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, 46(2) Legal Issues of Economic Integration 105 (2019), p. 106).

at the European level, its primary aim was firmly MS-centered, as the framework for FDI screening was built on the premise that the MSs had sole responsibility for protecting their national security.[14] The principal constatation of protecting primarily the public security of the MSs was achieved on the basis of five pillars: making public security grounds for FDI screening and thus a justification for possible domestic legal measures against certain foreign investment;[15] establishing the double voluntariness of domestic FDI screening;[16] rooting the framework in MSs' sole responsibility for protecting national security;[17] giving MSs the competence to issue comments if a foreign investment in a different MS is likely to affect its public security as part of the cooperation mechanism;[18] and vastly limiting the competences of the Commission, including solely the listed European projects and programs and non-binding opinions.[19] The FDI screening framework was established almost entirely for the purpose of safeguarding MSs' interests of public security.[20] National, and not European, interests were thus primarily protected. Under Regulation 2019/452, only limited interests of the Union (selected European projects and programs) were protected by the MSs through their domestic FDI screening mechanisms.[21]

The EU FDI screening framework, which emerged from Regulation 2019/452, was a mechanism that arguably allowed solely for the protection of MSs' interests of public security. The European Commission had no powers to use FDI screening for the protection of the interests of the Union, including its security. It was the experience of two major crises striking Europe shortly after the Regulation's adoption that inspired dualistic changes to the nature of the FDI screening mechanism.[22] These changes, under the legally unchanged Regulation 2019/452, in turn

[14] Art. 1(2) of Regulation 2019/452.

[15] *Ibidem*, Art. 1(1), 3(1).

[16] The MSs' voluntariness in deciding whether to screen a certain foreign direct investment (*ibidem*, Art. 1(3)) and their voluntary adoption of the domestic FDI screening mechanism (Art. 1(3)); *see also* Preamble (8).

[17] *Ibidem*, Preamble (7), Art. 1(2).

[18] *Ibidem*, Art. 6(2).

[19] *Ibidem*, Art. 8, 7(7), 7(2).

[20] Contrary to the original Proposal, the European Commission had no powers under Regulation 2019/452 to influence MSs' decision to either adopt a screening mechanism or to screen a certain FDI. Even though the Commission had the competence to issue opinions regarding FDI on MSs' territory, the opinions were non-binding and limited to instances when unscreened FDI is "likely to affect security or public order in more than one Member State" (*see* Art. 7(2)). This competence did not serve the purpose of protecting the security of the Union nor the interests of the Union as a whole. Moreover, even with regard to the projects or programs of the Union's interests, the only power the Commission had was to issue a non-binding opinion and wait for the MSs to decide whether to protect the Union's interest, through the domestic screening of a particular FDI.

[21] *Ibidem*, Art. 8.

[22] *But see supra* note 3.

facilitated the possibility of protecting first European interests and, subsequently, European economic security.

2.2. European Commission guiding FDI screening during the pandemic: COVID-19 as a trigger for dualistic changes in FDI screening's scope

The EU FDI screening framework was not adopted as a response to a crisis, nor for the purpose of protecting against crises.[23] However, the experience of a crisis did lead to significant changes in the mechanism's hitherto purely domestic nature. The experience of the COVID-19 pandemic allowed the Commission to use FDI screening to safeguard the Union's common security interests. Because the crisis threatened MSs collectively, the protection of European interests (i.e., the collective interests of the MSs) became necessary for the protection of the domestic interests of public security. In light of the COVID-19 pandemic, the protection of MSs' public security demanded that European security be protected. Consequently, FDI screening's scope dualistically changed. Firstly, it was subjectively extended to include European interests. Secondly, its objective scope transformed to safeguard not only MSs' public security, but also European security and, later, European economic security. The collective interests of the MSs, and thus European interests, were now equally, if not primarily, protected. This change in the mechanism's nature transpired without amendments to Regulation 2019/452 but was instead initiated by the Guidance issued by the European Commission in response to the COVID-19 pandemic.[24] This transformation allowed for the protection of not only Union projects and programs, but common European security, through domestic FDI screening mechanisms of the MSs.

The experience of the COVID-19 pandemic inspired and allowed European security to be protected by the domestic FDI screening mechanisms of the MSs under the unchanged Regulation 2019/452. Ultimately, the COVID-19 pandemic facilitated the protection of European economic security through FDI screening in the 2024 EESS.

As mentioned above, the EU FDI screening framework was adopted in 2019, but was to be applied from October 2020. Between the Regulation's entry into force and its application, circumstances for both the Union and the MSs changed rapidly and drastically, in the face of a crisis: the COVID-19 pandemic. The crisis brough

[23] Neither the Proposal for Regulation 2019/452 nor the Regulation itself directly indicated why, suddenly, the EU decided to start legally responding to public security-related threats arising from FDI. It is widely accepted, however, that the rise of Chinese investments in Europe, including Chinese takeovers or attempted takeovers of European companies in crucial economic sectors, directly influenced the emergence of the EU FDI screening framework.

[24] It can be argued that only when faced with crises induced by the COVID-19 pandemic was the Commission able to achieve its original aim of Regulation 2019/452 – protecting Union security. *See supra* note 12.

a broad set of various challenges, including the resilience of healthcare industries and the fulfillment of healthcare-related needs of citizens. As part of its response to this crisis, the European Commission issued a Guidance to the MSs concerning foreign direct investment and the free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452. The issuance of this Guidance, being a direct response to the COVID-19-induced crisis, dualistically changed the nature and scope of FDI screening.

In the document, the Commission specified how FDI screening can be used by the MSs as a tool for addressing and mitigating risks of foreign investment during the pandemic. The document was not, however, a mere instruction for MSs on how to use FDI screening in times of crisis. The language and content of the Guidance indicate its much higher importance. The document changed the nature of FDI screening in two dimensions. Firstly, it made what was hitherto the sole matter of the MSs a common European issue. Secondly, it laid the foundations for the EESS through emphasizing the economic consequences and economic risks of the COVID-19 crisis and framing FDI screening as a relevant protective tool against them.

As mentioned above, the relevance and importance of FDI screening in times of crisis was specified by the Commission in relation to the COVID-19 pandemic.[25] FDI screening's application does not seem surprising.[26] What is surprising is that these foreign investment-born risks are placed by the Commission in the European context. FDI's risks are portrayed in the Guidance as risks for the security of the whole Union and not solely for the public security of a particular MS: "[a]cquisitions of healthcare-related assets would have an impact on the European Union as a whole."[27] Surprisingly, the Commission does not specify what it means that something is a threat to European security and not to the public security of the MSs, but expresses the desire to protect against such threats either way.[28] Even the document's title reflects this "Europeanness," as the Guidance was issued for "the protection of Europe's strategic assets."[29] These strategic assets "are crucial to Europe's security and are part of the backbone of its economy and, as a result, of

[25] *See supra* note 5.

[26] Especially since the Commission specified in its Guidance that "today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools" (COVID-19 Guidance, p. 1).

[27] *Ibidem*. The Commission expressed further: "The risks to the EU's broader strategic capacities may be exacerbated by the volatility or undervaluation of European stock markets."

[28] The purpose of this paper is not to define and distinguish between the FDI-related threats to European security versus MSs' public security. The statement presented above – "FDI's risks are portrayed in the Guidance as risks for the security of the whole Union and not solely for the public security of a particular Member State" – is an analysis of the Guidance, not my opinion.

[29] COVID-19 Guidance, p. 1.

its capability for a fast recovery."[30] Consequently, a MS's decision to screen a certain FDI, preceded by an analysis of its impact on the MS's public security, ceases to be a purely domestic issue (as it was under Regulation 2019/452). It becomes a primarily European matter because, during the COVID-19 pandemic, the MS's decision of whether to screen a certain FDI (and thus whether to protect its public security) directly affects European security, understood as the common security of all the MSs. In the Commission's view, MSs need to be vigilant to "ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens."[31]

As the COVID-19-related risks of foreign investment are primarily risks to the Union as a whole rather than to a particular MS, in the Commission's view, FDI screening needs to be remodeled to reflect this new, European perspective. As the risks changed, the mechanism of protection against them had to be transformed. To be able to address and effectively protect against these "European risks," FDI screening had to be moved from the domestic to the European realm. As a result of this necessity, during the COVID-19 pandemic, national FDI screening gained a new function: protecting European security. The previous FDI screening, being a protective mechanism for the public security of the MSs, had to change into a mechanism for protecting European interests. "FDI screening should take into account the impact on the European Union as a whole, in particular with a view to ensuring the continued critical capacity of EU industry, going well beyond the healthcare sector."[32] Its scope was consequently transformed. Following the Guidance, when screening a particular FDI through domestic mechanisms, MSs had to look beyond their own public security, beyond their domestic circumstances, beyond their borders and assess the FDI's potential for threatening the other MSs and the whole Union. The MSs' public security became European security. It can thus be argued that European security has become new grounds for FDI screening, though not specified in Regulation 2019/452. On the basis of Commission's Guidance, MSs' domestic FDI screening directly protects European security.[33] For this purpose, the Commission urged the MSs to "make full use already now of its FDI screening mechanisms to take fully into account the risks to critical health

[30] *Ibidem*, p. 2.

[31] *Ibidem*.

[32] *Ibidem*, p. 2.

[33] It should be noted that very limited European interests were already protected by domestic FDI screening mechanisms of the MSs on the basis of Regulation 2019/452. What changed under the COVID-19 Guidance was the scope of these interests. Because of the pandemic-induced "European risks" arising from foreign investment, the MSs were called by the Commission to use their domestic screening to protect European security, and not solely "projects and programmes of Union's interest."

infrastructures, supply of critical inputs, and other critical sectors."[34] Furthermore, MSs who did not yet have an FDI screening mechanism in place were called upon to "to set up a full-fledged screening mechanism" for the purpose of assessing FDI's "risk to security or public order in the EU" and, meanwhile, use any other mechanisms to achieve this aim.[35]

It should be also noted that the Commission directly connected the EU's economy with FDI-induced risks to European security. In fact, the whole crisis caused by the COVID-19 pandemic is addressed in the Guidance solely in the economic context.[36] Even though the term "European economic security" is not used by the Commission in the Guidance, European strategic assets, protected by domestic FDI screening on the grounds of European security, are considered "the backbone" of the EU's economy.[37] Thus, it can be stated that FDI screening, transformed through the Guidance, protects the EU's economy. This transformation, triggered by the experience of a crisis, in turn, had subsequently led to yet another change in the scope of FDI screening – protecting European economic security – as specified in the EESS, issued in early 2024.

2.3. The result: European security emerging as a value protected by FDI screening

Even though the COVID-19 Guidance did not amend Regulation 2019/452 through creating new binding legal obligations for the MSs, the paper argues that it transformed the scope of the FDI screening mechanism to protect European security interests.38 Because the COVID-19 crisis threatened the MSs collectively, to protect their public security, the MSs had to broaden their FDI screening to include European security. The European Commission's Guidance, though not binding, facilitated and enabled what was necessary for an effective defense against FDI-induced threats: protecting European security through domestic FDI screening mechanisms in an effort to safeguard MSs' public security.39 The experience of

[34] *Ibidem*, p. 2.

[35] *Ibidem*.

[36] *Ibidem*, p. 1 ("The COVID-19 related emergency is having pervasive effects on the economy of the European Union"). *See also* Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, *Coordinated economic response to the COVID-19 Outbreak*, COM(2020) 112 final, p. 1, where COVID-19 is called a "major economic shock to the EU."

[37] COVID-19 Guidance, p. 2.

[38] *But see* C. Bian, *Investment Screening Put to the Test of the COVID-19 Pandemic: Typology, Legality and Externality*, 31(2) Asia Pacific Law Review 380 (2023), p. 384. For a similar view, particularly as regards the term "EU national security," *see* Robert, *supra* note 2.

[39] Interestingly, the very thought of screening foreign investment for the purpose of protecting European security had already been expressed in 2016 by the EPSC (*Engaging China... supra* note 12).

a crisis consequently inspired the profound dualistic changes to the FDI screening mechanism.

Following the COVID-19 Guidance, a few MSs revised their domestic FDI screening regulations. More importantly though, during the pandemic, the MSs relied on their FDI control measures to block foreign transactions for the purpose of protecting national security. Many of those actions were aimed at Chinese FDI. Interestingly, these are not limited to the healthcare sector, contrary to what might be expected during the COVID-19 pandemic. In December 2020, reports surfaced that Germany had opposed an acquisition by China Aerospace and Industry Group (CASIC) of the German company IMST GmbH, which specializes in satellite and radio communications technology. Though the official documents were not released, Reuters reported the vitality of IMST's know-how to national security, especially as "in various cases, IMST's products and services were also the subject of deliveries to the Bundeswehr armed forces."[40] In March 2021, Italy relied on its "golden power" to veto the acquisition of a domestic semiconductor company by Chinese Shenzhen Investment Holdings Co.[41] Even though Italy had the mechanism in place since 2012, it was used exceptionally, thus making all the more profound the decision to protect national interests and domestic semiconductor production.[42]

3. FDI SCREENING AIMED AT PROTECTING EUROPEAN ECONOMIC SECURITY: THE EESS

The COVID-19 crisis inspired and facilitated changes to the scope of FDI screening. As demonstrated above, since 2020, FDI screening was used to protect not only the public security of the MSs, but also European security. The COVID-19 emergency conveyed the importance of mechanisms aimed at safeguarding European interests and the common interests of the MSs in times of crisis. With the transformation of FDI screening allowing for the protection of European security interests, in 2023 the

[40] M. Nienaber, *Reuters, Germany Blocks Chinese Takeover of Satellite Firm on Security Concerns: Document*, Reuters, 8 December 2020, available at: https://www.reuters.com/article/world/germany-blocks-chinese-takeover-of-satellite-firm-on-security-concerns-document-idUSKBN28I282/ (accessed 30 June 2025).

[41] G. Lampo, *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover*, 1(2) The Italian Review of International and Comparative Law 433 (2022). The "golden power" refers to Italy's domestic FDI screening regime.

[42] Italy's FDI screening was revised to be in line with the EU's FDI Screening Regulation. The decision to prevent Shenzhen Investment Holdings Co. from acquiring 70% of LPE S.p.A was all the more important as the FDI control powers had not been invoked by the Italians since 2017. For details on the transaction, *see Italy's FDI Screening "Golden Power" Reflects Increasing Security Awareness*, datenna, available at: https://www.datenna.com/resources/the-italian-golden-power-increasing-concerns-towards-external-investments/ (accessed 30 June 2025); G. Fonte, *REFILE-Italy Vetoes Takeover of Semiconductor Firm by Chinese Company Shenzhen – Sources*, Reuters, 8 April 2021, available at: https://tinyurl.com/2dkt2zu3 (accessed 30 June 2025).

European Commission issued another document expanding the scope of European interests protected by MS's domestic mechanisms: the EESS.[43] The core aim of the EESS is to protect and enhance European economic security through a variety of mechanisms and tools to better face "new and emerging risks that have arisen in the more challenging geopolitical context."[44] Rooted in various crises, including the COVID-19 pandemic, the European Commission aims to use mechanisms specified in the EESS to protect European economic security in times of crisis and against potential crises. One of these mechanisms is FDI screening, the scope of which, upon inclusion in the EESS, was extended to protect European economic security. This change in the scope of FDI screening is at the center of this subsection, which demonstrates how the FDI screening mechanism will serve its newly added function and protect European economic security in times of crisis. This part of the paper concerns the most evolved form of the FDI screening mechanism, which was transformed from an instrument primarily protecting MS public security under Regulation 2019/452 toward one that safeguards European security, as enabled and demanded by the COVID-19 crisis, and then remodeled into a guardian of the European economic security – not as a fully independent and self-standing mechanism, but rather a part of a broader, more complex strategy.

FDI screening was classified as a mechanism for European economic security as early as June 2023, when the EESS was issued by the European Commission and the High Representative. In the EESS, FDI screening is framed as a part of the second pillar of the new strategy: "Protecting economic security."[45] This meant that FDI screening would be one of the tools protecting against economic security risks, in a broader direction toward "completing traditional approaches to national security with new measures to safeguard [...] economic security" for the aim of warranting "prosperity, sovereignty and safety."[46] For the purpose of ensuring the effectiveness of European economic security through FDI screening, in the EESS the Commission committed to revising the existing foreign direct investment screening framework.[47]

In line with this commitment, on 24 January 2024 a new proposal for the regulation on the screening of foreign investments was issued by the European Commission.[48] Basing on the experience of the COVID-19 crisis, which "underlined the

[43] European Commission, *Joint Communication to the European Parliament, the European Council and the Council on "EESS"*, Brussels, 20 June 2023, JOIN (2023) 20 final.

[44] *Ibidem*, p. 1. These risks, potentially leading to a crisis, are caused by and connected to "rising geopolitical tensions" and "certain economic flows."

[45] *Ibidem*, p. 6.

[46] *Ibidem*, p. 1. In the document, the citation is placed in the context of the EU.

[47] *Ibidem*, p. 8.

[48] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council*, Brussels, 24 January 2024, COM(2024) 23 final (Proposal for a New FDI Screening Regulation / New FDI Screening Regulation).

need to be able to identify risks to, and better protect EU critical assets from, certain investments," a few shortcomings of the existing framework were identified in the new proposal.[49] These contributed to the inefficiency of the existing mechanism, and thus the insufficiency of the existing solutions for protecting European economic security. It included the fact that not all MSs had adopted a domestic FDI screening mechanism, which, in turn, created "vulnerabilities because potentially critical FDIs remain undetected."[50] Consequently, strategic European assets, and thus European security, are not sufficiently protected from threats and risks arising from FDI. The Proposal for a New FDI Screening Regulation was intended to fill these gaps through revising the existing screening framework, which would ensure the efficiency of protecting European economic security through FDI screening. The three core pillars, on which the new regulatory framework is built, are the existence of a screening mechanism in the domestic legal system of all MSs; the identification of a "minimum sectoral scope where all Member States must screen foreign investments"; and the extension of "EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country."[51] These amendments to Regulation 2019/452, including the generally upheld characteristic of the existing framework, constitute a basis for the protection of European economic security through FDI screening.

Even at first glance, it is visible that the Commission proposed profoundly deep changes to the existing framework. Two of the above specified amendments transform MSs' discretion regarding adopting a domestic screening mechanism as well as choosing its scope. Consequently, it can be argued that the New FDI Screening Regulation is based on the Commission's direct interference in MSs' rights to protect their essential security interests.[52] Indeed, on the basis of the New FDI Screening Regulation, the Commission imposes the obligation to adopt the domestic FDI screening mechanism and defines its scope. The protection of European economic security demands withdrawal from voluntary FDI screening in favor of compulsory domestic screening.[53] The obligatory FDI screening would ensure the impermeability of the whole mechanism and ensure that European economic security is not endangered by a potentially concerning FDI which does not undergo any screening because of the discretionary decision of a MS, as was

[49] *Ibidem*, p. 1.

[50] *Ibidem*.

[51] European Commission Press Release, *Commission proposes new initiatives to strengthen economic security,* Brussels, 24 January 2024.

[52] It should be emphasized that in Art. 1(4) of the Proposal for a New FDI Screening Regulation, equally as in Regulation 2019/452, "sole responsibility [of a MS] for its national security" was preserved.

[53] Compare the language of Art. 3(1) of Regulation 2019/452 with Art. 3(1) of the Proposal for a New FDI Screening Regulation.

possible under Regulation 2019/452. In Art. 4 of the Proposal for a New FDI Screening Regulation, the Commission unprecedently set out a list of requirements for the domestic mechanisms of MSs, including a rule that "the screening authority shall be empowered to start screening foreign investments by its own initiative for at least 15 months after the completion of a foreign investment that is not subject to an authorization requirement."[54] Fundamentally, however, in Art. 4 the Commission defined the minimal scope of the domestic FDI screening mechanisms. For the protection of European economic security, the MSs were obliged to screen FDI "in EU companies participating in projects or programmes of EU interest"[55] provided for in Annex I, as well as "investments in EU companies active in areas of particular importance for the security or public order interests of the EU set out in Annex II."[56] Such a somewhat surprising solution being incorporated into the Proposal for a New FDI Screening Regulation is in direct correlation with the core purpose of the EESS. It guarantees and formally obliges the MSs to protect European economic security through compulsory screening of certain categories of FDI specified unilaterally by the Commission. It can be consequently stated that in the proposed New FDI Screening Regulation, European security interests are directly, and moreover, obligatorily protected by the MSs. The need to protect European economic security facilitated a fundamental change in the FDI screening mechanism – it not only officially connected European security with protection from risks arising from FDI, but, primarily, it obliged the MSs to go beyond their domestic realms of public security and formally compelled them to protect European interests. It should be emphasized, however, that the New FDI Regulation did not equip the Commission with competences to veto an FDI, nor to interfere with MSs' discretion in screening a certain investment, nor, ultimately, to change a MS's FDI screening decision. In this regard, the Commission's competences have not changed since the original FDI Screening Regulation.[57]

Even though the New FDI Screening Regulation is merely a proposal that has not been adopted, it is already visible that the protection of European economic security brought profound changes to the existing FDI screening framework, once again, fundamentally changing the mechanism's scope and nature to reflect its

[54] Art. 4(2)(c) of the Proposal for a New FDI Screening Regulation. For the full list of requirements, *see* Art. 4(2)(a)–(i).

[55] As specified above, Regulation 2019/452 also provided for the protection of European interests in the form projects and programs specified in Annex I. Under the old Regulation, however, the MSs were under no obligation to screen FDI relating to the projects and programs of Union interests. Under the proposed new Regulation, on the other hand, the MSs were required to do so and to formally include the legal basis for such screening in their domestic screening mechanisms (*ibidem*, Art. 4(4)).

[56] *Ibidem*.

[57] In the sense that under the New FDI Screening Regulation, the Commission's competences are still limited to issuing nonbinding opinions.

new purpose and function. Regardless of whether these – rather radical – changes are finally enforced as a new Regulation, the EU has no experience in applying FDI screening for the purpose of protecting economic security. This inexperience, further exacerbated by the accompanying fundamental change in the nature of FDI screening, carries the risk of ineffective protection of European economic security. For this reason and in this context, the final subsection of this paper offers insight into how the US was protecting its economic security through its domestic FDI screening regulations. The reference juxtaposes the EESS and the New FDI Screening Regulation with the US's experience in the matter in order to identify any potential shortcomings of the EU framework. The "lessons" from the US's protection of economic security through FDI-related legal regulations are presented dualistically. Firstly, the way the US's domestic FDI control regime was transformed to incorporate the protection of economic security is assessed. Secondly, insight to the practical application of the new legal regulations reveals potential challenges and good practices. The two dimensions constitute a starting point for the final concluding assessment of the EESS.

4. PROTECTION OF ECONOMIC SECURITY IN THE LEGAL EXPERIENCE OF THE UNITED STATES[58]

A debate over the necessity of protecting economic security has been ongoing in the US since the 1987 Congressional discussions on the Exon-Florio amendment.[59] Though initially framed as economic interests or the "economic well-being of the United States," the economic dimension of national security and its susceptibility to FDI-related threats has been discussed repeatedly in Congress over the years.[60]

[58] It is important to note that the phrase "FDI screening" is not applicable in the US context. It is replaced with a materially similar phrase: "national security review of FDI." For this reason, this subsection relies on nomenclature appropriate to the US context.

[59] 20 October 1987 Exon-Florio Hearing in the House of Representatives, p. 32; Omnibus Trade and Competitiveness Act of 23 August 1988, 102 Stat. 1425 (1988), which included the Exon-Florio amendment to the Defense Production Act of 1950, 64 Stat. 798 (1988).

[60] Through the long history of reviewing FDI on national security grounds, both the interpretation and the domestic US approach to economic security changed repeatedly and often radically. At every stage, however, discussions were centered around the question of whether national security should be interpreted broadly to the extent that it would include economic security. During initial discussions on the Exon-Florio Amendment, the protection of economic interests was quickly abandoned. It gained momentum in 2007 during Congressional debates on reforming CFIUS, ultimately leading to the passage of the Foreign Investment and National Security Act of 2007 (FINSA). Then, a strong conviction that "in our constituents' minds, national security and economic security are linked" was voiced by Representative Blackburn (*see* House Financial Committee, 7 February 2007 Hearing, p. 20). During discussions on FINSA, Representative Bachus – one of the co-sponsors of the bill – argued that foreign investment "poses a serious threat to our economic security" (House Financial Committee, 7 February 2007 Hearing, *Introductory Statement by Representative Bachus*, p. 3). Though considerations on the definition of economic security

However, only in 2018 did economic security begin to be protected by the national security review of FDI and covered by the statutory authority of CFIUS – an interagency committee authorized to review FDI on the grounds of national security. That year, the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) profoundly transformed the previous US FDI review system, centered around the relatively weak and ineffective CFIUS, to allow for the protection of economic security, among other things.[61] Two main factors contributed to that change.[62] Firstly, China had emerged as "a true great power competitor to the United States."[63] FIRRMA was a response to the "Chinese threat," which has shaken the founding paradigm of CFIUS and the national security review of FDI governed by it, ultimately leading to national security being reconnected with economic security based on FIRRMA.[64] Secondly, Donald Trump assumed the Office

are beyond the scope of this article, it is important to mention that the notion's understanding was subject to heated debates in Congress in 2007. Many voiced often contradictory opinions. Fundamentally, the relationship between national security and economic security was debated, some suggesting that the notions are separate. For example, the Chairman of the proceedings clearly considered the notions distinct when he criticized "identifying their own economic wellbeing with national security" when referring to some groups in society (*ibidem*, p. 4). His statement additionally highlights the lack of consensus on nomenclature: "economic security," "economic wellbeing," "economic interests," and "economic factors" seemed to be used synonymously. Only many years later, when discussing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), did the "economic security" narrative become prevalent.

[61] Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII of Public Law 115–232 (13 August 2018). For more on FIRRMA and the history of the national security review of FDI in the US, *see* A. Thompson, *The Committee on Foreign Investment in the United States: An Analysis of the Foreign Investment Risk Review Modernization Act of 2018*, 19(2) Journal of High Technology Law 361 (2019); J. Barrington, *CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 Tennessee Journal of Business Law 77 (2019), p. 6.

[62] The change is sometimes identified as a paradigm shift, with the two specified factors allowing for the new paradigm to emerge. *See* W. Moreland, *FDI Like You're FDR: CFIUS Review under the Biden Administration's Rooseveltian Conception of National Security*, 12(3) Journal of National Security Law and Policy 627 (2022).

[63] *Ibidem*, p. 628. Now, in 2025, China is openly considered a threat to US national security. In his memorandum "America First Investment Policy" issued in February 2025, President Trump directly named China a "foreign adversary" and announced the usage of "all necessary legal instruments, including CFIUS" to prevent investors of Chinese origin to invest in critical US technologies. The 2018 motto, "Economic security is national security," continued on by President Biden, is now as relevant as ever (D.J. Trump, *America First Investment Policy,* The White House, 21 February 2025, available at: https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/ (accessed 30 June 2025)). *See also* J.R. Biden, Jr., *Interim National Security Strategic Guidance*, The White House, 3 March 2021, p. 15, available at: https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/nsc-1v2.pdf (accessed 30 June 2025).

[64] Moreland calls this new perspective on national security (one which includes economic security) a comeback to the "Rooseveltian conception of national security," which "is essential to the American constitutional system's survival" (Moreland, *supra* note 62, p. 63). Though not stipulated directly in the text, from its legislative history it is clear that FIRRMA was aimed at mitigating risks of Chinese investment. In one of the first Congressional hearings preceding the enactment of the new law, China was described as a "threat to national security" (Hearing before the Subcommittee on Monetary Policy and Trade of the Committee on Financial Services U.S. House of Representatives One Hundred Fifteenth Congress Second

of the US President, and his principal motto for strategic policy was, "Economic security is national security."[65]

Firstly, and fundamentally under FIRRMA, the notion of national security as a core protected value includes economic security. Economic interests, conceptualized as economic security, are to be taken into account when considering national security. This represents a profound shift in a paradigm governing the US national security review of FDI centered around CFIUS, which had been based on a sharp distinction between national security and the economy.[66] How is the US's economic security protected from FDI-related threats under FIRRMA? Primarily, FIRRMA's enactment was fueled by the need to protect the US economy from Chinese investment. Economic interests threatened by Chinese FDI became an issue of national security.[67] To protect these interests, conceptualized as economic security, the national security review of FDI had to change. To accommodate the protection of economic security, FIRRMA brought amendments to five major areas of the former framework governed by FINSA and introduced unprecedented solutions. In the next part of the paper, FIRRMA will be portrayed through the dualistic lenses of protecting economic security from Chinese FDI.

Session of 9 January 2018, Serial No. 115–67, *Evaluating CFIUS: Challenges Posed by a Changing Global Economy*, p. 2. (Evaluating CFIUS's Hearing)). Note that some scholars claim that the national security review of FDI governed by CFIUS had always addressed, and not merely in 2018, threats to the US economy. For example, Rose argues that "the history of CFIUS has always been a series of political reactions to political *and* economic concerns" (P. Rose, *FIRRMA and National Insecurity*, 45 Public Law and Legal Theory Working Paper Series 1 (2018), p. 4).

[65] D.J. Trump, *National Security Strategy of the United States of America*, The White House, 18 December 2017, available at https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (accessed 30 June 2025); P. Navarro, *Why Economic Security Is National Security,* White House, 10 December 2018, available at: https://trumpwhitehouse.archives.gov/articles/economic-security-national-security/ (accessed 30 June 2025). It should be additionally mentioned that Donald Trump assuming the Office of President and the subsequent pursuance of the "economic security is national security" policy was preceded by growing antagonism towards Chinese investment on US soil, often with strong governmental ties and funding. The antagonism resulted in Presidential divestment orders – Ralls Corporation and Fujian Grand Chip Investment Fund (by President Obama) – and reached its climax during President Trump's presidency, ultimately leading to the passage of FIRRMA, which was, arguably, aimed directly at Chinese FDI. For more on the Ralls-Fujian takeover, *see* A.S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21(5) George Mason Law Review 1347 (2014).

[66] Moreland, *supra* note 62, p. 63. The paradigm shift is adequately conceptualized by one of the witnesses during Congressional hearings preceding FIRRMA's enactment: "The highest priority for public officials is, of course, ensuring the national security. Our national security depends, however, on the innovation and the productivity of our economy" (Evaluating CFIUS's Hearing, p. 11).

[67] See numerous conjoint references to economy and national security in assessing Chinese foreign practices during Congressional hearings leading to and on FIRRMA's legislative proposals (Evaluating CFIUS's Hearing, pp. 7, 10).

4.1. FIRRMA

As stated above, FIRRMA was a direct legal response to the emergence of the "Chinese threat" to national security. The rapid growth of inward Chinese FDI, presidential divestment decisions aimed at companies of Chinese origin, and heightened political antagonism toward China, coupled with Chinese foreign policy, contributed to the need to revisit the national security review of FDI hitherto governed by FINSA. How did FIRRMA help protect economic (and, naturally, national) security from threats arising from Chinese investments? It amended FINSA's framework as follows.[68]

4.1.1. Expansion of CFIUS' jurisdictional mandate

The most profound amendment entailed the expansion of CFIUS jurisdiction to cover a new scope of transactions. This change manifests in two ways. Firstly, FIRRMA freed CFIUS from reviewing solely those transactions which result in an acquisition of a controlling interest.[69] Since the passage of FINSA in 2007, CFIUS was limited to authority over transactions resulting in "foreign control." The term "control" was not statutorily specified, as Congress left CFIUS with the power to define it.[70] Until 2018, CFIUS could only review, and thus use its powers to ultimately block, a transaction resulting in a foreign entity having the power to "direct the decisions of the acquired American entity."[71] FINSA's framework was consequently governed by the paradigm that only foreign investments resulting in an acquisition of a controlling interest would potentially be concerning from a national security standpoint. However, the emergence of Chinese FDI revealed that national security, including US economic interests, can be threatened by transactions which do not result in control of an American company. Under FIRRMA,

[68] The subsequent analysis is not intended to provide an exhaustive portrait of FIRRMA. As the US experience in protecting economic security from FDI-originating threats serves solely as a reference point for evaluating the EESS and the New FDI Regulation, the analysis will be limited to amendments crucial from the standpoint of economic security. One such omitted amendment was the introduction of a mandatory filing. Under the previous framework governed by FINSA, all filings were voluntary. Since 2018, certain types of transactions, mainly regarding critical technology and those tied to government, had to be reported to the Committee.

[69] It was argued that foreign investors had, increasingly, used complicated investment structures and different kinds of transactions to use CFIUS's jurisdictional gap, thus avoiding its review process (M. Kennedy, *CFIUS Re-Enhanced: The Foreign Investment Risk Review Modernization Act of 2018 and China*, Developments in Administrative Law & Regulatory Practice 327 (2018), p. 332).

[70] *FINSA H.R.* 556 Sec. 2(2). The term "control" has the meaning given to such term in regulations which the Committee shall prescribe. For more on FINSA, *see* K.E. Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act that Needs Revision*, 15(1) University of California Davis 43 (2008).

[71] M. de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSA") in Foreign Investment in the U.S.*, 2(1) Law Raza 1 (2011), p. 10.

CFIUS's authority to review FDI became much more flexible and broader, which facilitated the protection of economic security. Since 2018, CFIUS has been able to review "any investment by a foreign person in any United States critical technology or United States critical infrastructure company that is unaffiliated with the foreign person." Passive investments have been defined narrowly by Congress in order to, arguably, prevent future litigation.[72]

The second jurisdictional change was giving CFIUS the authority to review transactions of "critical technology," as well as real estate purchases in close proximity to military installations and any other "facility or property of the United States Government that is sensitive for reasons relating to national security."[73] The protection of critical technology and critical infrastructure is at the heart of FIRRMA. Fundamentally, national security is to be defined as including "its application to critical infrastructure."[74] To that end, directly in FIRRMA's text, Congress offered guidance on considerations to be made during the examination of national security risks.[75] CFIUS was particularly urged to take into account the "cumulative control" or a "pattern of recent transactions" tied to either foreign government or a foreign person, over critical infrastructure, critical technology or an energy asset, or critical material.[76]

Furthermore, FIRRMA expanded the scope of covered transactions to include investments which afford the foreign person "access to any material nonpublic technical information in the possession of the United States business."[77] This legal solution enabled protection against Chinese FDI in particular, which – through attempting to acquire critical technology – directly threatened the US's economic security. Lastly, under FIRRMA, CFIUS took jurisdiction over joint ventures and "any other action designed to be a circumvention" of its jurisdiction.[78]

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[72] *See* Rose, *supra* note 64, p. 14 (claiming that the narrow interpretation directly corresponds to United States Court of Appeals for the District of Columbia Circuit, *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296 D.C. Cir. 2014).

[73] FIRRMA 50 U.S.C. 4565(a)(5)(B)(ii).

[74] *Ibidem*, 4565(a)(1).

[75] *Ibidem,* Sec. 1702(c). Other amendments to the existing framework included a new procedure within CFIUS, the so-called "declarations" or "light filing"; straightening of the regulation of particular transactions or of mitigation agreements for reducing national security risk; and expanding previous CFIUS review timelines; introducing CFIUS's special hiring authority and funding. Furthermore, FIRRMA introduced the concept of a "country of a special concern" and an obligation.

[76] FIRRMA Sec. 1702(a)(c)(2). The issue of cumulative control and a pattern of transaction was later addressed and developed by President Biden in his Executive Order 14083, issued in 2022.

[77] FIRRMA Sec. 1703(a)(4)(D)(i)(I).

[78] *Ibidem*, Sec. 1703(a)(4)(B)(i) and Sec. 1703(a)(4)(B)(v).

4.1.2. Legal solutions tailored to specifically address Chinese FDI

As FIRRMA was primarily aimed at economic concerns stemming from Chinese FDI, the second most important change was the introduction of solutions specifically addressing it. Firstly, FIRRMA relies on the term "country of a special concern." During its assessment, CFIUS may take into account "whether a transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US technological and industrial leadership in areas related to national security."[79] The final text of FIRRMA does not include a definition of a "country of a special concern," but the Senate's version of the bill defined it as "a country that poses a significant threat to the national security interests of the United States."[80] The House version of FIRRMA included an even more detailed definition, linking it with US foreign trade and anti-terrorism practices.[81] Importantly, under FIRRMA, CFIUS was not obliged to sustain a list of such countries, giving the Committee more flexible authority and more leeway in exercising it.

The argument that FIRRMA was aimed primarily at combating threats from Chinese investments is further strengthened by the obligation of reporting to Congress on Chinese investments in the United States. Every two years, the Secretary of Commerce was required to inform Congress about the "[t]otal foreign direct investment from the People's Republic of China in the United States, including total foreign direct investment disaggregated by ultimate beneficial owner," as well as "a breakdown of investments from the People's Republic of China in the United States" specified by different categories.[82] The Secretary in particular is obliged to specify "a list of companies purchased through government investment by the People's Republic of China."[83]

4.1.3. New filing procedure – Declarations

Another fundamental change brought by FIRRMA was the new filing procedure and its so-called declarations.[84] Instead of a traditional written notice, the parties may submit a shorter notice – a declaration – including basic information on the transaction. Such a "lighter-touch filing" is not to exceed five pages.[85] After the

[79] *Ibidem*, Sec. 2(b)(1).

[80] FIRRMA, Senate version, Congressional Record, November 8, 2017, S7111.

[81] *See* Rose, *supra* note 64, p. 13 (citing FIRRMA's version of the House: 50 U.S.C. 4565(a)(3)(C)(i)(I)).

[82] FIRRMA 50 U.S.C. 4565 Sec. 1719 (b).

[83] *Ibidem*.

[84] *Ibidem*, 4565 Sec. 1706.

[85] Rose, *supra* note 64, p. 14. The "light filing" nomenclature is used by the Committee. See *Summary of the Foreign Investment Risk Review Modernization Act of 2018,* U.S. Department of the Treasury, available at: https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf (accessed 30 June 2025).

Committee receives a declaration, it can take all sorts of actions, such as requesting the filing of a traditional written notice and greenlighting the transaction. CFIUS should take action within 30 days of receiving a declaration. The new filing procedure is arguably friendly to foreign investors, as submitting a declaration, which is voluntary, may speed the CFIUS review process in case a transaction is greenlit at the declaration stage.[86]

The above-listed amendments to the US national security review of FDI profoundly modernized and transformed the way in which national security is protected from risks arising from FDI. Being a direct implementation of President Trump's "economic security is national security" policy, these changes incorporated in FIRRMA's text responded to the need to protect economic security. The need to safeguard this realm of national security triggered normative and practical transformation of the past mechanism, simultaneously increasing its rigorous effectiveness in protecting US national security from various threats arising from – mostly Chinese – FDI.

4.1.4. Challenges of FIRRMA's FDI review

As described above, FIRRMA had substantially amended the past national-security-based FDI review. Even though the changes equipped CFIUS with broader and stricter authority to accommodate the protection of economic interests, among other things, the regime is not without challenges. Those are best revealed by practice. After FIRRMA expanded its powers, CFIUS reviewed an unprecedented number of transactions.[87] The main challenge of the new regime is the assertion of jurisdiction over a wider scope of transactions.[88]

Even though FIRRMA significantly expanded the scope of transactions to fall within CFIUS's jurisdiction, CFIUS asserts its jurisdiction over a broader class of transactions for the purpose of protecting national security. An example of such a practice is the attempted acquisition of the South Korean Magnachip Semiconductor Corporation by the Chinese private equity company Wise Road Capital.[89]

[86] Traditional written notice is to be reviewed by the Committee within 45 days; under the declarations procedure, action is to be taken within 30 days.

[87] *Annual Report to Congress*, Committee on Foreign Investment in the United States, Washington: 2020, p. 6.

[88] Other, more foreign investor-centered challenges include judicial review of CFIUS's actions, especially regarding retrospective review of already completed transactions, which raises due process claims. This controversial matter recently resurfaced when an acquisition of US Steel by Japanese Nippon Steel was blocked by President Biden.

[89] For more on CFIUS's practice, *see generally* E. Leaf, *Tiktok, Tick-Tock: How Committee Foreign Investment in the United States (CFIUS) Can Mitigate Threats Posed by Foreign-made Software Applications*, 6 Administrative Law Review 343 (2021); P. Connell, T. Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States,* 39 Yale Journal of International Law 131 (2014); A. Feder, *A Bull in a China Shop: How CFIUS Made TikTok a National Security Problem*, 5(2) Cardozo International & Comparative Law Review 627 (2022).

CFIUS asserted jurisdiction over the transaction even though no US business was to be acquired. Controversies surrounding CFIUS jurisdiction over the Magnachip acquisition are rooted in the definition of "United States business." According to FIRRMA, a US business "means a person engaged in interstate commerce in the United States."[90] However, when the Committee issued its regulations implementing the new law, the Committee omitted "interstate commerce" from its definition of a "United States business."[91] When practitioners challenged them on it, CFIUS responded that "the proposed definition tracks the language of FIRRMA and is not intended to suggest that the extent of a business's activities in interstate commerce in the United States is irrelevant to the Committee's analysis of national security risk."[92] Though not stated directly, it can be argued that since FIRRMA, the Committee perceives its jurisdiction as not being limited to the "extent of [a US business's] activities in interstate commerce in the United States."[93] In other words, the omission can be interpreted as CFIUS jurisdiction being extended to business activities not relating to matters of interstate commerce. Potentially, this could be the basis for broadening Committee's jurisdiction outside of its limits provided in FIRRMA. This controversial issue was precisely what emerged in the Magnachip–Wise Road Capital acquisition. The Committee was not notified of the transaction's intent because Magnachip's business activity was located outside of the United States.[94] Despite that, CFIUS asserted jurisdiction over Wise Road Capital's investment and shortly after issued an interim order blocking the transaction until a review could be concluded.[95] Apparently, the transactions raised national security concerns and, as a result, the parties decided to withdraw from the merger. The Committee's actions regarding the acquisition were controversial. As Magnachip's business activities in the US were practically non-existent, CFIUS asserting its jurisdiction represents an aggressive interpretation of its FIRRMA-based jurisdictional authority. If the

[90] FIRRMA 50 U.S.C. 4565 Sec. 1703 (13).

[91] Department of the Treasury Office of Investment Security, *31 CFR Parts 800 and 801 RIN 1505–AC64, Provisions Pertaining to Certain Investments in the United States by Foreign Persons*.

[92] Department of the Treasury Office of Investment Security, *31 CFR Parts 800 and 801 RIN 1505–AC64 Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, 85(12) Federal Register 3112 (2020), p. 3119 https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf (accessed 30 June 2025).

[93] *Ibidem*. In its previous Regulations, CFIUS defined a "US business" as "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce." B.L. Van Grack, J. Brower, *CFIUS's Expanding Jurisdiction in the Magnachip Acquisition*, Lawfare, 11 October 2021, available at: https://www.lawfaremedia.org/article/cfiuss-expanding-jurisdiction-magnachip-acquisition (accessed 30 June 2025).

[94] For more details on Magnachip's business activities and its location, *see* Van Grack, Brower, *supra* note 93.

[95] P. Hastings, *Magnachip CFIUS Case Underscores Focus of U.S. Government on Semiconductor Supply Chain Security*, LEXOLOGY, 17 September 2021, available at: https://www.lexology.com/library/detail.aspx?g=5e5c8f05-b535-41b4-91bf-5388841bb5d2 (accessed on 30 June 2025).

Committee continues to interpret its jurisdiction so broadly, practically any transaction – even one with an extremely limited US connection – could be subject to the national security review, even though it falls out of CFIUS' jurisdiction. This tendency toward jurisdictional expansion can potentially lead to the statutorily stipulated CFIUS jurisdiction being insufficient to protect US national security, including its economic interests. It can also presage that CFIUS will be used more and more often primarily as a political tool, with flexible and highly adaptive competences. This would allow for maximum protection of national security interests, through an appropriate interpretation of the regulations, enabling jurisdiction over a virtually unlimited scope of potentially dangerous transactions.[96]

As portrayed above, FIRRMA revolutionized the way FDI is reviewed for the purpose of protecting national security. Aimed at addressing threats arising mainly from Chinese investment and at accommodating the protection of economic interests, CFIUS jurisdiction became unprecedently wide. Since 2018, practically any transaction with a foreign element could be reviewed by the Committee and thus prevented from moving forward. Under FIRRMA, national security includes economic security and the previous framework thus became wider and stricter. Despite the tightening of the old regime governed by FINSA, FIRRMA's solutions seem to be insufficient for efficient national security protection, as CFIUS had specifically interpreted its powers to include an even broader category of transactions.

CONCLUSION

As demonstrated above, FDI screening established under Regulation 2019/452 profoundly transformed because of the experience of a crisis. It started as a mechanism purely aimed at protecting MSs' public security, but it was transformed through the COVID-19 emergency into a mechanism that protected European security. Even though Regulation 2019/452 was not amended, the COVID-19-induced threats arising from FDI prompted the MSs, somewhat accidentally, to protect European security through their domestic FDI screening mechanisms. The previous scope of FDI screening was transformed to also protect European security interests. Based on the experience of a crisis, in light of changing geopolitical and geoeconomic international dynamics, in 2023, the European Commission yet again, but consciously this time, amended the scope of FDI screening. The mechanism gained a new purpose: it was now set to be directly used for the protection of European economic security, as specified in the EESS. Protecting European economic security, through a mechanism legally and practically unsuitable for this purpose, demanded changes

[96] Strong politicization of the review process is yet another challenge of the FIRRMA-based regime.

to its legal basis. Therefore, in early 2024, the Commission issued a Proposal for a new framework for FDI screening, which, if adopted, would replace Regulation 2019/452. In the Proposal, which was aimed at accommodating FDI screening to protecting European economic security, the Commission planned a deep – and quite surprising – interference into the MSs' competences, particularly relating to the protection of national security and their essential security interests. In the Commission's view, safeguarding the EU's economic security demanded that compulsory FDI screening be introduced in all its MSs, as well as normative safeguards for European interests in their domestic legal systems. The latter is supposed to be achieved through defining the minimal scope of FDI screening directly in the New FDI Screening Regulation. Because the practical application of FDI screening in protecting European economic security raises concerns, exacerbated further by the EU's bold proposal and lack of experience in that regard, the US's experience can serve as a useful reference. Surprisingly, even though economic security was a part of the earliest discussions on the US's national security review of FDI, only in 2018 was it formally added to CFIUS's authority. Moreover, it occurred in the context of a rapidly growing threat to US national security from Chinese investments, which enabled national security to be connected with economic security. The need to protect US economic security through its national security review of FDI influenced and justified profound changes to the mechanism itself, including a significant broadening of CFIUS jurisdiction, as well as the inclusion of rules directly regarding the protection of critical technology – aimed precisely at Chinese FDI. In other words, the US's decision to protect its economic security through the existing mechanism of reviewing FDI resulted in a significant tightening of its national security review of FDI. Juxtaposing the US's experience with the EU's (hitherto liberal) rules, justified by maintaining an open investment environment, it can be argued that, for the purpose of effectively protecting European economic security, the Proposal for a New FDI Screening Regulation should have been, or in the future should be, made even stricter. Possibly, the old idea of establishing an EU committee on foreign investments that would imitate CFIUS should be reevaluated and reconsidered. Perhaps, simply moving FDI screening fully to the European level, by establishing a specialized Committee, would guarantee and enable the fully effective protection of European economic security, as the US's experience clearly indicates.

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EFFECTIVENESS AND CONSTITUTIONAL STANDARDS AS A BARRIER TO THE CORRECT IMPLEMENTATION OF THE EUROPEAN GENERAL ANTI-ABUSE RULE

Abstract: *A key element in the fight against tax avoidance within the European Union has been the obligation for all Member States to introduce a harmonised general anti-abuse rule (GAAR). This article explores the interplay between the Polish constitutional standards regarding the GAAR, the need to ensure its effectiveness and EU standards derived from Art. 6 of the ATA Directive and the case law of the Court of Justice of the European Union (CJEU). The analysis concludes that, while the subjective test was implemented correctly, Poland failed to properly implement Art. 6 of the ATA Directive in relation to the genuine activity test and the objective test. The Constitutional Tribunal established a very high standard for the protection of taxpayers' rights, which hinders the proper implementation of the GAAR and conflicts with the case law of the CJEU and the provisions of the ATA Directive.*
Keywords: general anti-abuse rule, GAAR, constitutional standards, ATA Directive, CJEU case law, incorrect implementation, effectiveness

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INTRODUCTION

The adoption of Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATA Directive)[1] represents one of the most significant legislative developments in recent

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[1] Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193.

years. Among its key provisions is the general anti-abuse rule (GAAR), codified in its Art. 6. The transposition and harmonisation of the GAAR have sparked considerable controversy due to the varied approaches to anti-abuse rules across the Member States (MSs). While some countries boast a long-standing tradition of such regulations, others have relied primarily on doctrines shaped by case law. In certain jurisdictions, anti-abuse rules were either entirely absent or introduced only recently.[2]

Poland first enacted a GAAR in 2003, but the provision was repealed in 2004 following a ruling by the Constitutional Tribunal.[3] For the next twelve years, the Polish legal system operated without any general anti-avoidance rule. This absence coincided with growing internal and external challenges. Domestically, tax avoidance resulting from aggressive tax planning was on the rise,[4] due in part to the lack of a GAAR. Internationally, both the EU and the OECD exerted increasing pressure on MSs to introduce general anti-abuse measures into their legal systems.[5] This external pressure stemmed not only from the global shift against aggressive tax planning, but also from efforts to curb harmful tax competition by jurisdictions that had yet to implement anti-abuse legislation. Poland eventually reintroduced a GAAR in 2016, following a recommendation issued by the European Commission in 2012.[6] The provisions were subsequently revised in 2018 to bring them more closely in line with the wording of Art. 6 of the ATA Directive.[7]

This article aims to demonstrate that Poland has incorrectly implemented Art. 6 of the ATA Directive in relation to the genuine activity test and the objective test, while the subjective test has been implemented correctly. The flawed implementation stems from two sometimes conflicting tendencies: the commitment to uphold the standards set by the Constitutional Tribunal and the determination to ensure that the GAAR remains an effective tool in combating tax avoidance for the tax

[2] For an overview of countries that have implemented the ATA Directive's GAAR, *see* V. Dafnomilis, *Overview of the Implementation of the Anti-Tax Avoidance Directive into Member States' Domestic Tax Laws*, PwC, Rotterdam: 2020, p. 24.

[3] Polish Constitutional Tribunal, judgment of 11 May 2004, K 4/03.

[4] R. Piekarz, A. Miarkowski, *Znikające miliardy. Jak transfer dochodów za granicę drenuje polski budżet. Raport* [Disappearing Billions: How Income Shifting Abroad Drains the Polish Budget. A Report], Centrum Analiz Klubu Jagiellońskiego, Warszawa: 2015; R. Dover, B. Ferrett, D. Gravino, E. Jones, S. Merler, *Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union. Part I: Assessment of the Magnitude of Aggressive Corporate Tax Planning*, European Parliamentary Research Service, Brussel: 2015; K. Bąkowska, M. Gniazdowski, M. Lachowicz, *Horyzont optymalizacji – geneza, skala i struktura luki w podatku CIT* [The Horizon of Optimization – The Genesis, Scale and Structure of the CIT Gap], Polski Instytut Ekonomiczny, Warszawa: 2019.

[5] First, the EC issued its Recommendation on aggressive tax planning, followed by the ATA Directive.

[6] Commission Recommendation of 6 December 2012 on aggressive tax planning [2012] OJ L 338/41.

[7] The subject of this article is the current provisions of the GAAR. Previously applicable regulations will be omitted, as the current regulation implemented the ATA Directive.

authorities. Meeting the requirements set by the Constitutional Tribunal in its 2004 judgment, including the overly detailed specification of vague terms, could narrow the material scope of the GAAR and, as a consequence, render it no longer an effective tool for protecting the fiscal interests of the state.

The subject of the general anti-abuse rule continues to generate active discussion in both domestic and international legal doctrine. The proper implementation of the GAAR has already been addressed in the scholarly literature, particularly in the work of Błażej Kuźniacki.[8] However, this study adopts a distinct perspective and arrives at partially different conclusions regarding the correctness of Poland's implementation of Art. 6 of the ATA Directive. Crucially, the purpose of this article is not limited to identifying specific instances of flawed transposition. Rather, it seeks to uncover the root causes of these shortcomings, which, as mentioned above, lie in the attempt to reconcile two potentially conflicting objectives: adherence to the constitutional standards set by the Constitutional Tribunal and the desire to ensure that the GAAR remains an effective instrument in combating tax avoidance. Striving to meet the constitutional requirements articulated in the Tribunal's 2004 judgment – particularly the demand for detailed specification of vague legal terms – may unduly narrow the material scope of the GAAR and, consequently, undermine its practical effectiveness in safeguarding the fiscal interests of the state. An appreciation of the Polish constitutional context – marked by an especially high standard of taxpayer protection – will enable foreign readers to understand how this very standard gives rise to practical difficulties in the implementation of the GAAR.

1. THE PROHIBITION OF ABUSE OF LAW AS A GENERAL PRINCIPLE OF EU LAW

The prohibition of abuse of law, at its core, prevents taxpayers from invoking rights or benefits derived from EU law in a manner that defeats the purpose for which such law was established. In the case law of the Court of Justice of the European Union (CJEU), this principle has gradually been affirmed as a general principle of EU law.[9] Most MSs' legal traditions contain some concept of preventing abuse of rights (e.g. the German concept of *Missbrauch des Rechts* or the French *abus de droit*),[10] and the EU principle builds upon the shared elements of these traditions.

[8] B. Kuźniacki, *Poland's Implementation of EU GAAR Compromises Constitutional and EU Principles*, 49(3) Intertax 237 (2021).

[9] G. Butler, K.E. Sørensen, *The Prohibition of Abuse of EU Law: A Special General Principle*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, Edward Elgar Publishing, Cheltenham: 2022, pp. 402–422.

[10] A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, 18(6) European Review of Private Law 1121 (2010), pp. 1125–1126.

Likewise, the prohibition of abuse of law is firmly embedded in public international law.[11] It is usually conceptualised as a corollary of the overarching principle of good faith, enshrined, inter alia, in Arts 26 and 31(1) of the Vienna Convention on the Law of Treaties.[12] As such, it qualifies as a "general principle of law recognised by civilised nations", which the International Court of Justice applies pursuant to Art. 38(1)(c) of its Statute.[13] In the international tax sphere, this general principle influences the shape of modern anti-abuse instruments, including Art. 6 of the ATA Directive and Art. 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

The CJEU's case law on the prohibition of abuse of law initially developed outside the field of tax law (e.g. in the context of internal market freedoms), and was subsequently shaped through key rulings in tax matters. In the field of direct taxation, the principle arises primarily in two contexts: in the realm of EU secondary law (tax directives), where taxpayers seek tax advantages conferred by directives (exemptions, tax neutrality in cross-border mergers, etc.), and in the realm of EU primary law (the fundamental freedoms of the internal market), where MSs justify anti-abuse measures that restrict cross-border activities.

Currently, the prohibition of abuse of law serves two essential functions.[14] Firstly, it acts as an interpretative tool of EU law, filling legal gaps and ensuring the coherence and effectiveness of the Union legal order. Secondly, in exceptional cases, the principle operates as a higher-ranking interpretative canon that requires national authorities to disapply domestic provisions insofar as their application would facilitate abusive practices. For the purposes of this article, particular importance lies in identifying the standard applied by the CJEU with respect to the prohibition of abuse of law. The roots of the EU GAAR can be found in the case law of the Court, which, over the years, has shaped this of abuse of rights as a general principle of EU law,[15] and the GAAR should be seen as a (partial) codification of the

[11] On the abuse of rights in international law, *see* M. Byers, *Abuse of Rights: An Old Principle, A New Age*, 47(2) McGill Law Journal 389 (2002).

[12] Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[13] Statute of the International Court of Justice (adopted on 26 June 1945, entered into force on 24 October 1945), 33 UNTS 993.

[14] R. de la Feria, *EU General Anti-(Tax) Avoidance Mechanisms*, in: G. Loutzenhiser, R. de la Feria (eds.), *The Dynamics of Taxation: Essays in Honour of Judith Freedman*, Hart Publishing, Oxford: 2020, pp. 155–184. De la Feria even describes the prohibition of abuse as an "overriding rule of law" that may justify a *contra legem* interpretation; For a more nuanced perspective, *see* W. Schön, *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective*, Max Planck Institute for Tax Law and Public Finance, Munich: 2019, pp. 13–14, available at: https://ssrn.com/abstract=3490489 (accessed 30 June 2025).

[15] *E.g.* A.M. Jimenez, *Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law*, 66(4–5) Bulletin for International Taxation 270 (2012), available at: https://ssrn.com/abstract=2392512 (accessed 30 June 2025); A. Ballancin, F. Cannas, *The Development of the Doctrine of Abuse of Law and the Danish Cases: Time*

jurisprudential standard. Furthermore, this case law will be relevant in answering the question of how a MS should proceed in the event of non-implementation or incorrect implementation of a directive.

The first case on the abuse of rights was *Van Binsbergen*,[16] which was non-tax in nature and concerned the regulation of the public profession. The CJEU held that freedom guaranteed under Art. 59 (of the Treaty Establishing the European Economic Community) cannot be invoked for the purpose of "avoiding the professional rules of conduct which would be applicable to him if he were established within that State."

In the field of tax law, the issue of abuse of rights first arose in *Imperial Chemical Industries*.[17] The CJEU stated that "the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits." In this case, the question of abuse of rights served merely as a justification raised by a MS to restrict the freedom of establishment for a system of corporate tax group relief.

The real breakthroughs in terms of the doctrine of abuse of rights were three judgments: *Emsland-Stärke*,[18] *Halifax*[19] and *Cadbury Schweppes*.[20] The *Emsland-Stärke* case admittedly did not concern tax matters, but in this ruling the CJEU developed a test invoked in subsequent judgments. According to the Court, a finding of abuse requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, as well as a subjective element consisting of the intention to obtain an advantage from the Community rules by artificially creating the conditions laid down for obtaining it. The doctrine of abuse of rights established in *Emsland-Stärke* was first extended to tax law in the *Halifax* VAT case. The CJEU agreed that the doctrine of "abuse of Community law" could also be applied in tax law, even though it was not regulated by secondary law. This is how abuse of law was subsequently understood and defined in direct taxation

to Shift the Focus from Non-Genuine Arrangements to Single (Abusive) Transactions?, 30(2) EC Tax Review 70 (2021); R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, 29(4) EC Tax Review 142 (2020); R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a General Principle of EC Law Through Tax*, 45(2) Common Market Law Review 395 (2008). *But see* D. Leczykiewicz, *Prohibition of Abusive Practices as a "General Principle" of EU Law*, 56(3) Common Market Law Review 703 (2019).

[16] Case C-33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131.

[17] Case C-264/96 *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, EU:C:1998:370.

[18] Case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, EU:C:2000:695.

[19] Case 255/02 *Halifax and Others v. Commissioners of Customs & Excise*, EU:C:2006:121.

[20] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, EU:C:2006:544.

cases, such as *Cadbury Schweppes*. The cases were of a different nature, however, as the CJEU used the principle of abuse of law as an instrument of judicial review of national legal provisions and not as a basis for counteracting abuse of law in the form of a judicial doctrine.

In the case of direct taxation, the CJEU did not at first consider the prohibition of the abuse of law as a basis for anti-abuse. In both *Kofoed*[21] and *3M Italia*[22] it stated that MSs are not obliged to combat abusive practices in the field of direct taxation if no anti-abuse national legislation is present. This decision was reversed in judgments known as the Danish "beneficial ownership" cases.[23] According to the CJEU:

> In the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights [...] where they are invoked for fraudulent or abusive ends.[24]

In justifying the change in its position, the CJEU referred to the *Italmoda* case, from which it follows that the prohibition of abuse of law is a general principle of the EU. Thus, if the conditions required to obtain the advantage are met only formally, the MSs are obliged to refuse to grant the advantage, even if a MS has not transposed the anti-abuse provisions into domestic legislation. This goes against the principle of an "inverse vertical direct effect" (*estoppel*), which precludes imposing obligations stemming from a non-transposed Directive against an individual,[25] as

[21] Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408, paras. 46, 48.

[22] Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. 3M Italia SpA*, EU:C:2012:184, para. 32.

[23] For a critical assessment of these judgments, *see generally* L. De Broe, S. Gommers, *Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases*, 28(6) EC Tax Review 270 (2019); S. Baerentzen, *Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?*, 12(1) World Tax Journal 3 (2020); A. Zalasiński, *The ECJ's Decisions in the Danish "Beneficial Ownership" Cases: Impact on the Reaction to Tax Avoidance in the European Union*, 2(4) International Tax Studies 1 (2019); J. Korving, L.C. van Hulten, *Case Law Note: Svig og Misbrug: The Danish Anti-Abuse Cases*, 47(8) Intertax 793 (2019). It is also worth considering a more nuanced view, according to which the Danish beneficial ownership cases did not overturn the ruling in *Kofoed*, but instead relied on a different, autonomous legal basis: the general principle of EU law prohibiting abuse, which does not require transposition into national law (*see* Zalasiński, *supra* note 23, p. 9).

[24] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others v. Skatteministeriet*, EU:C:2019:134, para. 111; Joined Cases C-116/16 and C-117/16 *Skatteministeriet v. T Danmark and Y Denmark Aps*, EU:C:2019:135, para. 83.

[25] De Broe, Gommes, *supra* note 23, pp. 272, 274–275. *See also* Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, para. 9; Case C-148/78 *Criminal proceedings against Tullio Ratti*, EU:C:1979:110, paras. 22–23; Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408,

this would infringe on the general EU law principle of legal certainty.[26] The CJEU thus emphasises the prevention of abuse over the principle of legal certainty in the context of tax avoidance. As taxpayers approach the boundaries of abusive behaviour, the protective scope of legal certainty diminishes. For instance, Judith Freedman argues that legal certainty "should not be the overriding aim" and suggests that in such cases it may even be undesirable.[27] At the same time, reference should be made to the judgment in *X GmbH*,[28] which examined the compatibility of Germany's controlled foreign company legislation with the free movement of capital under Art. 63 TFEU. In this ruling, the CJEU stated that MSs may invoke anti-abuse considerations as justification, provided that the national measures comply with the principle of proportionality. This translated the abuse doctrine to the Treaty freedoms. Importantly, the standard for identifying abuse adopted in this case was aligned with that applied in the Danish beneficial ownership cases.

Subsequent rulings have not altered the essence of the prohibition of abuse of law as a general principle of EU law. Nonetheless, two post-2019 judgments in the area of direct taxation merit attention: *Lexel AB*[29] and *X BV*.[30] The former concerned the denial of deductions for interest paid to an affiliated French company under Swedish rules aimed at combating base erosion. The Court found that the Swedish legislation imposed a disproportionate restriction on the freedom of establishment, as it did not allow taxpayers to demonstrate that their transactions were genuine and commercially justified, thereby failing to specifically target only wholly artificial arrangements. A key element of the ruling was the Court's suggestion that a loan granted on arm's-length terms should not, in itself, be considered artificial. This understanding, however, was clarified in *X BV* (Dutch Interest Barrier), where the Court held that debt to an affiliated entity, even if subject to an arm's-length interest rate, may indeed form part of a wholly artificial arrangement if it lacks genuine economic substance. For anti-abuse rules to be considered proportionate, taxpayers must be given an effective and practical opportunity to demonstrate that their transactions are genuine. At the same time, wholly artificial arrangements remain subject to the prohibition of abuse of law, even if they are structured on arm's-length terms.

para. 45; and, more recently, Case C-425/12 *Portgás – Sociedade de Produção e Distribuição de Gás SA v. Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, EU:C:2013:829, para. 22.

[26] See an extensive critique of the direct application of the general principle of abuse of EU law: J. Englisch, *The Danish Tax Avoidance Cases: New Milestones in the Court's Anti-Abuse Doctrine*, 57(2) Common Market Law Review 503 (2020).

[27] J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, 4 British Tax Review 332 (2004), p. 333.

[28] Case C-135/17 *X-GmbH v. Finanzamt Stuttgart - Körperschaften*, EU:C:2019:136.

[29] Case C-484/19 *Lexel AB v. Skatteverket*, EU:C:2021:34.

[30] Case C-585/22 *X BV v. Staatssecretaris van Financiën*, EU:C:2024:238.

Considering CJEU case law, the prohibition of abuse is a general principle of EU law, and this applies to tax law as well. In the case of both indirect and direct taxation, it is a basis for MSs to prevent abuse. As a general principle, it serves to aid the interpretation of EU law to fill the gap so as to safeguard the coherence of EU law.[31] Moreover, in light of the CJEU case law, the principle prohibiting abuse may exceptionally justify interpretations that deviate from the explicit literal wording of legal provisions (*contra legem* interpretation).[32] This allowed the CJEU to disregard the doctrine of *estoppel* and, as a result, serve as autonomous legal grounds for preventing abuse.

2. THE GAAR (ART. 6 OF THE ATA DIRECTIVE)

The first European anti-abuse rules may be found in the Merger Directive of 1990[33] and the Interest and Royalties Directive of 2003.[34] These directives contain two types of anti-abuse provisions. The former refers to national domestic or agreement-based anti-abuse rules, while the latter allows for the refusal to apply or withdraw the benefit of a directive where it appears that one of the operations has tax evasion or tax avoidance, as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance.[35]

Plans to introduce a GAAR first emerged in 2012. The European Commission announced an Action Plan to strengthen the fight against tax fraud and tax evasion, encouraging MSs to introduce a GAAR.[36] The Commission then issued a recommendation on aggressive tax planning, indicating the desired shape of a common GAAR,[37] the wording of which reflected the model developed in the *Emsland-Stärke*, *Halifax* and *Cadbury Schweppes* rulings.

The European Commission, in implementing base erosion and profit shifting (BEPS) actions, decided to additionally require MSs to implement a GAAR. The shape of the rule under Art. 6 of the ATA Directive deviated from the standard

[31] De Broe, Gommes, *supra* note 23, p. 277.

[32] De la Feria, *supra* note 15, p. 142.

[33] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34.

[34] Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157.

[35] The anti-abuse provision was cited from the Merger Directive. The Interest and Royalties Directive contains similar provisions, although worded a little differently.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the 27 January 2012, *Trade, growth and developmentTailoring trade and investment policy for those countries most in need*, COM(2012)22 final: "An Action Plan to strengthen the fight against tax fraud and tax evasion".

[37] Commission Recommendation of 6 December 2012 on aggressive tax planning [2012] OJ L 338/41.

developed by the CJEU (primarily in terms of the subjective test) and more closely resembled the principle purpose test (PPT) developed under BEPS or the specific anti-abuse rules in the Merger Directive and the Interest and Royalties Directive.

According to Art. 6 of the ATA Directive, for the purposes of calculating the corporate tax liability, a MS shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. Such an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

Art. 6 of the ATA Directive thus consists of three elements: an arrangement, a tax advantage and abuse. The first two elements are formulated relatively broadly to identify as many abusive patterns as possible. Only the third premise is significantly narrower so as to capture and eliminate only undesirable tax schemes. It is the way in which abusiveness is defined that is the most controversial, and for this reason it will be considered more extensively here.

The element of abusiveness consists of three tests: the subjective test ("main purpose or one of the main purposes of obtaining a tax advantage"), the objective test ("defeats the object or purpose of the applicable tax law") and the genuine activity or economic substance test or the artificiality test ("an arrangement or a series of arrangements which [...] are not genuine having regard to all relevant facts and circumstances").

The subjective test sets a relatively low threshold of abuse relating to "the main purpose or one of the main purposes of obtaining a tax advantage", given that in many jurisdictions, this level was significantly lower.[38] Legislators in various legal orders have used the following phrases: sole, essential, or dominant purpose, or one of the purposes to obtain tax advantage.[39] The CJEU jurisprudence was similar, setting the threshold at the level of a "sole or essential/predominant" purpose.[40]

It seems that setting the threshold of protection for the corporate tax base so high may have had two justifications. The first was to maintain consistency between

[38] B. Kuźniacki, *The GAAR (Article 6 ATAD)*, in: W. Haslehner, K. Pantazatou, G. Kofler, A. Rust (eds.), *A Guide to the Anti-Tax Avoidance Directive*, Edward Elgar Publishing, Cheltenham: 2020, p. 143.

[39] The lawmaker may calibrate the subjective test ranging from "sole purpose" through a "significant", "primary", "main", "paramount", "predominant", "dominant", "ruling", "prevailing", "decisive", "principal" or "most influential" purpose, ending with "one of the purposes" or "a purpose". For more on the subject, along with a comparative discussion on GAAR in Australia, New Zealand, the UK and South Africa, *see* P. Rosenblatt, *General Anti-Avoidance Rules for Major Developing Countries*, Wolters Kluwer, Deventer: 2015, pp. 47–53.

[40] Raising the threshold of protection for the corporate tax base in the subjective test in the EU GAAR has been criticised in the literature. *E.g.* S. Govind, I. Lazarov, *Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law*, 47(10) Intertax 852 (2019), pp. 858–859. Similarly,

the EU GAAR and the PPT test developed under BEPS.[41] Second, a similar level of protection was applied in specific anti-abuse rules in the Merger Directive and the Interest and Royalties Directive. It should be emphasised that the subsequent jurisprudence of the CJEU has been adapted to the new threshold set by the ATA Directive. In the Danish beneficial ownership cases, the CJEU used the phrase "principal objective or one of its principal objectives".[42] It seems that the work of the OECD, secondary EU legislation and the global trend toward tightening measures against tax avoidance have influenced the shift in the CJEU's previous jurisprudential standard.

The objective test requires that an arrangement or a series of arrangements resulting in a tax advantage defeat the object or purpose of the applicable tax law. This means that it is enough for an arrangement to defeat either the scope of the tax law or what it was intended to achieve. Ostensibly, this means that the test has a broader application than if the lawmaker had required the two conditions be met simultaneously. However, the literature points out that because the object and purpose of taxation are closely linked, it is difficult to imagine them occurring separately.[43] In some legal orders, there are also significant doubts about the meaningfulness of transposing the object of the applicable tax law, which has a different meaning in various legal cultures.[44]

The ATA Directive uses the wording "non-genuine" instead of "artificial". However, legal scholars[45] hold that these concepts should be considered identical and

raising of the threshold of protection in the subjective test in the PPT clause has been criticised under EU law. *See* E. Kemmeren, *Where is EU Law in the OECD BEPS Discussion?*, 23(4) EC Tax Review 190 (2014), pp. 192–193; D. Beckers, L. De Broe, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law*, 26(3) EC Tax Review 133 (2017), p. 142.

[41] The approximation of the wording of the PPT clause and the EU GAAR may have been intended to avoid the accusation of incompatibility with EU law on the grounds of the disproportionality of different treatment of cross-border and domestic situations. *See* A. Báez Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test – What Have We Gained from BEPS Action 6?*, 45(6) Intertax 432 (2017), pp. 444–446. The approximation of the EU principle of abuse to the PPT clause seemed to have been foreseen by Ana Paula Dourado (A.P. Dourado, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, 43(1) Intertax 42 (2015), pp. 56–57).

[42] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others v. Skatteministeriet*, EU:C:2019:134, para. 127; Joined Cases C-116/16 and C-117/16 *Skatteministeriet v. T Danmark and Y Denmark Aps*, EU:C:2019:135, para. 100.

[43] Kuźniacki, *supra* note 38, p. 148.

[44] B. Kuźniacki, *Dekodowanie hipotezy GAAR: przesłanki intencji i sprzeczności oraz relacje między nimi, cz. 1* [Decoding the Hypothesis Underlying GAAR: Conditions of Intention and Unlawfulness and the Relationships Between Them, Part 1], 6 Przegląd Podatkowy 19 (2020), p. 34.

[45] The literature on the subject postulates that this concept should be understood in the context of the CJEU's elaborate definition of artificiality. *See* Kuźniacki, *supra* note 38, pp. 148, 155. The same understanding was suggested in the Commission's proposal – Proposal for a Council Directive of 28 January

understood in accordance with the CJEU's case law on artificiality. The artificiality test relates to an arrangement or a series of arrangements which is not genuine in light of all relevant facts and circumstances. According to Art. 6(2) of the ATA Directive, an arrangement or a series thereof shall be regarded as non-genuine to the extent that it has not been put in place for valid commercial reasons which reflect the economic reality. Under a note on the Application of the "Minimum Level of Protection",[46] the definition of a "non-genuine arrangement" does not set any minimum standard. MSs may draft their GAAR beyond what is "non-genuine", but the definition of "non-genuine" should remain unchanged. This makes sense, given that the notion of artificiality originates from CJEU jurisprudence, where the prohibition of abuse of law was recognised as a general principle of the EU. For this reason, the definition of artificiality – at least in the context of relations between MSs – should be understood as setting a maximum, rather than a minimum, standard of protection within the meaning of Art. 3 of the ATA Directive.

Finally, in the definition of "non-genuine arrangement", it is worth noting that the phrase "to the extent that" means that the arrangement may be wholly or partly artificial. Naturally, this gradation of artificiality also entails a reduced scope of the GAAR's application. For instance, if there is an artificial transfer of passive payments between genuine entities, then the GAAR will only be able to be applied to these transferred payments. In this way, the GAAR may be applied precisely, referring only to elements of an artificial nature.

3. CONSTITUTIONAL STANDARD

In 2003, the first Polish GAAR was introduced in Art. 24b of the Tax Ordinance to provide a legal basis for combating tax avoidance.[47] The GAAR read as follows:

> Tax authorities and tax inspection authorities, when deciding tax cases, shall disregard the tax consequences of legal acts if they prove that no significant benefits other than those resulting from a reduction in the amount of the tax liability, an increase in the loss, an increase in the overpayment or a tax refund could be expected from the performance of such acts.[48]

2016, *laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, COM(2016) 26 final, for example, recital 9.

[46] DG TAXUD, *Note on the Application of the "Minimum Level of Protection"*, 18 March 2016, p. 3.

[47] Act of 29 August 1997 – Tax Ordinance [2021] JoL 2021, 1540 as amended.

[48] All translations from Polish into English are by the author of this article unless otherwise noted.

Due to the conciseness of the GAAR and the use of vague terms, it caused much controversy and was quickly reviewed by the Constitutional Tribunal.[49] The GAAR, as presented, was found to be incompatible with the standard of specificity of legal provisions (Art. 2, in conjunction with Art. 217 of the Polish Constitution[50]). The Tribunal made it clear that the lawmaker is entitled to enact a GAAR in principle, but that it must nevertheless follow constitutional norms. The Constitutional Tribunal set three basic conditions for declaring a GAAR compatible with the Polish Constitution:

- the premises for understanding (interpreting) a given vague term should not be determined by subjective elements;
- the use of vague terms should be accompanied by the need to give them such content as to guarantee the uniform application of law;
- the meaning of vague terms should not be determined by the authorities, as this would lead to impermissible lawmaking on the part of those authorities.

At this point, it is worth noting that the Constitutional Tribunal was not stating these criteria for the first time. It had previously referred to them as a standard in analogous rulings concerning the prohibition of abuse of rights[51] under the Civil Code.[52] In that case, however, the Tribunal found Art. 5 of the Civil Code to be consistent with the Constitution, pointing out, among other things, the key role of case law. Despite invoking the same criteria, the Tribunal adopted a completely different approach in the case of the GAAR, which justifies the claim that a certain jurisprudential standard has emerged with regard to anti-abuse regulations in tax law.

In the view of the Constitutional Tribunal, imprecise and vague statutory provisions pose a risk of violating the freedoms and rights of individuals and citizens. Legal provisions that create uncertainty regarding the rights and obligations of their addressees must be deemed incompatible with the Constitution. Such regulation fails to meet the requirement of predictability of decisions based on it, and may consequently lead to impermissible lawmaking by the authorities applying the law.

The Tribunal assessed a specific version of the anti-abuse clause that was previously in force in the Polish legal system. It explicitly stated that the very phenomenon of a normative legislative reaction to economically harmful practices – especially in the form of a general anti-abuse rule – does not raise constitutional concerns. herefore, the Tribunal did not reject the idea of counteracting abuse of law per se, but rather struck down the specific form in which it had been implemented.

[49] Polish Constitutional Tribunal, judgment of the 11 May 2004, K 4/03.
[50] Constitution of the Republic of Poland of 2 April 1997 [1997] JoL 78, 483, as amended.
[51] Polish Constitutional Tribunal, judgment of the 17 October 2000, SK 5/99.
[52] Act of 23 April 1964 – Civil Code [2024] JoL 1061 as amended.

Despite this declaration, it must be noted that the Tribunal articulated conditions for any future GAAR that, in my opinion, are overly restrictive and, in practice, preclude the creation of an effective GAAR. Firstly, the Tribunal emphasised the necessity of clarifying vague terms in such a way as to ensure uniform application of the law and to eliminate subjective interpretive elements. However, the essence of a general anti-avoidance rule lies precisely in its reliance on open-ended legal terms. Such a clause must retain flexibility to adequately respond to constantly evolving tax avoidance schemes. Excessive precision would render the provision ineffective, as taxpayers could adjust their conduct to avoid falling within its scope.

Secondly, the Tribunal took a particularly far-reaching position, asserting that vague terms must not be defined by the authorities applying the law, as this would constitute impermissible lawmaking. It explicitly rejected the notion that the interpretation of vague terms underpinning the anti-abuse clause could be developed through the evolving jurisprudence of tax authorities and administrative courts. Yet, in a democratic state governed by the rule of law, the process of applying the law – by both administrative authorities and courts – is the fundamental means by which vague terms are clarified. Tax authorities give meaning to general clauses through decision-making, and the legality of those decisions is subsequently subject to judicial review.

The Tribunal thus questioned the typical functioning of anti-abuse provisions and the role of tax authorities in shaping their meaning, without offering a coherent alternative or providing clear guidelines for constructing a constitutionally compliant, yet effective GAAR. Ensuring the highest possible degree of legal certainty for taxpayers is, of course, a fundamental value in a democratic state governed by the rule of law. In the context of anti-avoidance provisions, this objective can be achieved, for example, through robust procedural safeguards. However, constitutional guidelines should not be formulated in a way that undermines the very essence of the prohibition against abuse of law, thereby rendering the instrument ineffective in practice.

In my view, these demands were overly excessive on the lawmaker, preventing the introduction of an effective GAAR[53] and leading to widespread avoidance of

[53] *See* D. Mączyński, *Wpływ orzecznictwa Trybunału Konstytucyjnego na trwałość instytucji materialnego prawa podatkowego* [Influence of the Constitutional Tribunal's Decisions in Tax Matters on the Stability of Institutions of Substantive Tax Law], 76(3) Ruch Prawniczy, Ekonomiczny i Socjologiczny 23 (2014); E. Drozdowski, *Hydra lernejska, czyli o braku możliwości pogodzenia wyroku Trybunału Konstytucyjnego z instytucją klauzuli przeciwko unikaniu opodatkowania* [The Lernaean Hydra. On the Impossibility of Accommodating the Constitutional Tribunal's Judgment and the General Anti-avoidance Rule], 82(4) Ruch Prawniczy, Ekonomiczny i Socjologiczny 187 (2020), p. 198; E. Prejs, *Nadużycie prawa podmiotowego w prawie podatkowym* [Abuse of Subjective Rights in Tax Law], 20 Przegląd Podatkowy 29 (2006), p. 37; K. Radzikowski, *Obejście prawa podatkowego w najnowszym orzecznictwie sądów administracyjnych* [Tax Law Evasion in Recent Judgments of Administrative Courts], 6 Przegląd Podatkowy 10 (2010), p. 11.

direct taxes during the twelve-year absence of a GAAR in the Polish legal system following the Constitutional Tribunal's judgment. In this situation, the only tool to counteract tax avoidance was through changes in tax regulations, which significantly complicated the tax system. Contrary to the intentions of the Constitutional Tribunal, this did not enhance legal certainty. As a result, no GAAR was enacted in Poland until 2016.

In the following sections of this article, I will argue that these unworkable requirements set by the Constitutional Tribunal – although grounded in a constitutionally protected value – left a lasting, negative imprint on the current Polish approach to anti-avoidance legislation.

4. IMPLEMENTATION OF ART. 6 OF THE ATA DIRECTIVE

The Polish lawmaker faced a difficult challenge: to implement a GAAR as set out in EU legislation while following the standards set by the Constitutional Tribunal. To implement the judgment of the Constitutional Tribunal, the lawmakers decided on numerous legal solutions aimed at increasing legal certainty and securing taxpayer rights. Tax proceedings in cases of tax avoidance and reversed effects of tax avoidance were closely regulated. Also, the Council for the Prevention of Tax Avoidance was created, which is an independent body tasked with giving nonbinding opinions on the appropriateness of the application of GAAR or measures limiting treaty benefits in individual cases. The Council also gives opinions on draft tax laws and amendments to tax laws contained in other normative acts on the prevention of tax avoidance. In addition, a taxpayer may apply to the head of the National Tax Administration for a "safeguard opinion" (a type of advance tax ruling), which protects the taxpayer from the application of the GAAR in a particular scope.

While procedural safeguards play an important role in the application of the law, the correct implementation of the Constitutional Tribunal's judgment is primarily dependent on the construction of the GAAR itself. Therefore, it is crucial to examine whether the concept of abusiveness has been properly transposed into the Polish legal order and to set the current form of the GAAR in the context of constitutional standards. The first version of the 2016 GAAR was largely based on the Commission Recommendation of 6 December 2012 on aggressive tax planning, and the next version under consideration in this article was intended to implement the ATA Directive.

The GAAR regulated in Art. 119a(1) of the Tax Ordinance reads as follows:

> An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its

provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance).

Also, in the case of a genuine activity test, the Polish specified that an arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons (Art. 119c(1) of the Tax Ordinance). In the case of a subjective test, the Polish law states that the assessment of whether gaining a tax advantage was (one of) the main objective(s) of an arrangement shall take into consideration the economic objectives of the arrangement indicated by the party (Art. 119d of the Tax Ordinance).

It is worth noting that, under the Polish legal order, the literal interpretation[54] plays a key role in the interpretation of legal provisions – especially in the case of norms of an invasive nature. Thus, the assessment of the proper transposition of EU provisions should largely refer to the text of the law. The assessment will be carried out separately for each of the tests covered in the GAAR: genuine activity, objective tests and subjective tests.

5. GENUINE ACTIVITY TEST

Art. 6 of the ATA Directive	Art. 119a (1) of the Tax Ordinance
1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance). Art. 119c (1) of the Tax Ordinance An arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons.
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

[54] R. Mastalski, *Miejsce wykładni językowej w procesie stosowania prawa podatkowego* [The Role of Literal Interpretation in the Application of Tax Law], 8 Przegląd Podatkowy 7 (2007); J. Brolik, *Wykładnia prawa podatkowego oraz jej determinanty* [Interpretation of Tax Law and its Determinants], 3 Zeszyty Naukowe Sądownictwa Administracyjnego 54 (2014), p. 56.

Art. 6(1) of the ATA Directive requires the GAAR to be applied to an arrangement or a series of arrangements which are not genuine in light of all relevant facts and circumstances. Art. 6(2) of the ATA Directive defines an arrangement or a series thereof as non-genuine to the extent that it has not been put in place for valid commercial reasons which reflect the economic reality. The Polish lawmaker chose to use the term "artificiality" used by the CJEU rather than the term "non-genuine" derived from Art. 6 of the ATA Directive. Like the ATA Directive, the Polish law also creates a definition of artificiality. However, this definition differs significantly from Art. 6(2) of the ATA Directive. According to Art. 119c(1) of the Tax Ordinance:

> An arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons. The reasons referred to in the first sentence shall not include the objective of gaining a tax advantage, contrary to the subject or objective of tax law or its provision.

Firstly, the definition in the ATA Directive is positive, whereas the one in Art. 119c of the Tax Ordinance is negative. Thus, from Art. 6(2) of the ATA Directive, one can determine what artificiality is, whereas from the Polish definition, one only learns what artificiality is not. Consequently, decoding the concept of artificiality is only possible by applying *argumentum a contrario*. The introduction of a negative definition creates the danger of expanding the scope of the concept of artificiality and introduces uncertainty for the taxpayer regarding its meaning.

Secondly, two new standards are introduced in the Polish definition: an "entity acting reasonably" and an "entity pursuing lawful purposes", absent from the definition of artificiality set in Art. 6(2) of the ATA Directive. It is difficult to understand why the Polish lawmaker added these elements to the definition of artificiality. The lawmaker introduced two additional standards to assess a taxpayer's course of action. However, due to their vagueness, it is difficult to assess whether these modifications raise or lower the minimum standard of protection. The situation does, however, lower the taxpayer's legal certainty.

The concept of an "entity acting reasonably" is a general clause referring to the standard of reasonableness. It is possible that the Polish lawmaker was inspired by British solutions,[55] where there is a so-called "double reasonableness" test. However,

[55] In the literature there are views that the double reasonableness test in the British GAAR sets a high threshold of abuse – *see* Kuźniacki, *supra* note 38, p. 144. Moreover, it serves as a mean to objectify the UK GAAR – *see* J. Freedman, *The UK General Anti-Avoidance Rule: Transplants and Lessons*, 73(6–7) Bulletin for International Taxation 332 (2019), p. 336; D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 versus the EU Principle of Legal Certainty and the EU Abuse of Law*, 10(1) Erasmus Law Review 48 (2017), p. 49. However, there are also opposing voices among legal scholars pointing

it is worth noting that the "double reasonableness" test in British law refers not to the concept of artificiality, but to the entire concept of abusiveness. The "double reasonableness" test requires British tax authorities to show that the arrangements "cannot reasonably be regarded as a reasonable course of action". This sets a high threshold for applying the British GAAR and creates a significant taxpayer safeguard. The same cannot be said of the Polish solution, which makes the concept of artificiality difficult to understand because the rationality test is a well-established standard in British law, while it is foreign to Polish legal culture.

The second standard – an "entity pursuing lawful purposes" – is even more problematic, as it introduces a concept that is completely foreign to Polish legal culture. Polish legal culture is familiar with the concept of the "purpose of law" or the "purpose of the provision", which are often combined with purposive interpretation and are part of the objective test in the GAAR. However, it is difficult to understand what "lawful purposes" are and how a catalogue of them could be established.[56] It is possible to speak of a lawful action or an action contrary to the purpose of a provision, but purpose itself cannot be lawful or unlawful. Consequently, the second standard introduces significant problems in understanding it.

The main part of the definition of artificiality is similar in content, although again some differences can be discerned. While the ATA Directive refers to valid commercial reasons which reflect the economic reality, the Polish regulation refers to a course of action adopted predominantly for justified economic reasons. It can be assumed that despite the different wording, these indicate similar regulatory content. An important distinction here is the use of the term "predominantly", which broadens the definition of artificiality in comparison to the European equivalent. The term "predominantly" implies that reasons other than justified economic reasons (tax reasons) reflecting the economic reality must be less significant than commercial reasons. The European GAAR requires only valid commercial reasons reflecting the economic reality; it does not specify what the appropriate balance between valid commercial reasons and tax reasons should be for an arrangement to be considered non-genuine.

In this way, the Polish definition of artificiality unjustifiably deviates from the standard developed by the ATA Directive. Perhaps the use of the phrase "predominantly" was intended as an attempt to transpose the phrase "to the extent" appearing in Art. 6(2) of the ATA Directive. If so, this would be an incorrect transposition of

out its shortcomings. Firstly, it is said to be unnecessary, similar to other subjective tests. Secondly, it is seen as too vague, giving too much discretion to tax authorities and courts. Thirdly, it may lead to inequality in the application of the law due to its subjective nature. *See* M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU*, Linde Verlag, Wien: 2016, p. 122. *See also* Kemmeren, *supra* note 40, p. 190.

[56] A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe* [Taxes and Tax Law], Wolters Kluwer, Warszawa: 2016, pp. 350–356; D. Birk, *Das Leistungsfähigkeitsprinzip als Maßstab der Steuernormen. Ein Beitrag zu den Grundfragen des Verhältnisses Steuerrecht und Verfassungsrecht*, Deubner, Köln: 1983, pp. 67–70.

the provisions of the ATA Directive. As explained above, the phrase "to the extent that" means that the arrangement may be wholly or partly artificial, and the GAAR should be applied accordingly to the degree of artificiality.

The Note on the Application of the "Minimum Level of Protection" clearly states that the definition of a "non-genuine arrangement" was not drafted as a minimum standard and should be complied with as such, where EU law prescribes that the impact of the GAAR be limited to "non-genuine" arrangements. According to the note, it is possible to enlarge the scope of the GAAR beyond what is "non-genuine" (e.g. by capturing arrangements where there is some element of commercial substance), but the definition of "non-genuine" should remain unchanged. Naturally, the note itself cannot constitute a binding interpretation of EU law. However, given that this definition reflects a well-established line of CJEU case law, it must be agreed that the modification is not permissible.

Considering the above, the modification of the definition introduced in the Polish law is incompatible with EU law. Firstly, the Polish lawmaker modified the definition of a "non-genuine arrangement" of what is prohibited. Secondly, the Polish lawmaker may have narrowed the definition of artificiality, which was drafted as a minimum standard. As mentioned above, the amendments in the Polish law had the potential to broaden the scope of the law. This was achieved through the negative definition of a "non-genuine arrangement" and the use of the term "predominantly". Additionally, the standards for an "entity acting reasonably" and an "entity pursuing lawful purposes" were ambiguous.

The incorrect transposition of Art. 6 of the ATA Directive, through the definition of artificiality, can be explained by two conflicting tendencies: the attempt to comply with the standards derived from the case law of the Constitutional Tribunal and the need to preserve the effectiveness of the regulations.

The attempt to meet the requirements of the Constitutional Tribunal was reflected in the expansion of the negative definition of artificiality, for example, by introducing the standards of an "entity acting reasonably" and an "entity pursuing lawful purposes". This measure was intended to give the appearance of greater precision in the GAAR, which was a fundamental requirement of the Constitutional Tribunal. One cannot help but notice that the additional elements introduced into the definition of artificiality were only meant to give the appearance of meeting constitutional standards. This is because specifying the anti-avoidance rule contradicts its nature and would make it impossible to apply in practice. So as not to limit the scope of the definition of artificiality too much, the additional defining elements are composed of vague terms.

A similar function – namely, to give the appearance of greater precision in the GAAR – is served by the list of fact patterns that may indicate artificial arrangements

found in Art. 119c(2) of the Tax Ordinance. However, this list does not constitute a positive definition of artificiality; rather, it merely indicates that the presence of these fact patterns may suggest that a course of action was artificial, without determining it itself. The listed fact patterns are diverse – some are significantly more likely to suggest artificiality than others (e.g. "elements leading to a result identical or similar to the state existing before the operation was carried out" versus "a pre-tax profit that is negligible in comparison to the tax benefit which does not directly arise from a genuinely incurred economic loss").

For these reasons, it cannot be said that this list affects the normative content of the concept of artificiality. Instead, it should be regarded as a form of interpretative guidance. The list is not discussed in detail in this publication due to its limited scope and lack of relevance to the assessment of the correctness of the transposition of Art. 6 of the ATA Directive. On the other hand, there was a clear tendency on the part of the Polish lawmaker to maintain the effectiveness of the GAAR. This is evidenced by the creation of the negative definition of artificiality and by the addition of the term "predominantly" in the criterion of justified economic reasons.

As a result, the negative definition of artificiality in the Polish law is significantly more complex and difficult to interpret than its EU counterpart. Therefore, the Polish definition of artificiality must be deemed inconsistent with the definition in Art. 6(2) of the ATA Directive.

6. THE OBJECTIVE TEST

Art. 6 of the ATA Directive	Art. 119a(1) of the Tax Ordinance
For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine [...].	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance).
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

Although the implementation of the objective test did not prove to be as complex a challenge as the artificiality test, it nevertheless also generated significant controversy. The key problem turned out to be the proper translation of Art. 6 of the ATA Directive so that it would be understood by the recipient of a legal text embedded in Polish legal culture. According to Art. 6 of the ATA Directive, the objective test obliges a MS to ignore a (series of) arrangement(s) which, having been put in place primarily for obtaining a tax advantage, defeats the object or purpose

of the applicable tax law. The problems in implementation concerned both the phrase "the object or purpose" and the phrase "applicable tax law".

The transposition of the phrase "the object or purpose" has shown that a literal translation of the directive may give rise to numerous interpretative doubts. The problem boils down to the fact that Polish legal science and practice use the concepts of both "the purpose of the law" and "the purpose of the provision." However, legal science is unfamiliar with the phrase "object of tax law or its provision", which is associated with the obligatory structural elements of a tax: its subject, object, base and rate.

Some have criticised the phrase "object of tax law or its provision" as being legislatively incorrect and incomprehensible.[57] Others have stated that this formulation can be rationalised by understanding it to be "the object of taxation according to (a provision of) the law."[58] Also, it was pointed out that it is an artefact of the legislative process and an established expression found in English legal culture.[59] Without questioning the latter view, it should be stated that a concept alien to Polish legal culture should not appear in the transposition of tax law.

The phrase "applicable tax law" was transposed as "tax law or its provision". According to Polish legal culture, the use of the conjunction "or" means that it is sufficient for one of the listed conditions to be met, i.e. either an advantage contrary to the object or purpose of tax law or an advantage contrary to the object or purpose of a tax law provision. This raises the concern that this condition will always be fulfilled, as the primary purpose of any tax law is fiscal. It has been argued by legal scholars that fiscal purpose is inherent in every law and therefore cannot be invoked in the application of a GAAR. Thus, the purpose of a law is to achieve such a state of affairs that the structural principles of the law are fulfilled – that what was to be taxed is taxed.[60] Other academics, however, do not accept this understanding of the premise and consider the transposition erroneous.[61] In their opinion, the correct

[57] B. Brzeziński, M. Kalinowski, A. Olesińska (eds.), *Ordynacja podatkowa. Komentarz praktyczny* [Tax Ordinance: A Practical Commentary], Ośrodek Doradztwa i Doskonalenia Kadr, Gdańsk: 2017, p. 632; M. Guzek, M. Stefaniak, *Klauzula przeciwko unikaniu opodatkowania. Komentarz praktyczny* [General Anti-avoidance Rule: A Practical Commentary], C.H. Beck, Warszawa: 2018, ch. II.1.2.2; M. Kondej, *Sprzeczność korzyści z przedmiotem i celem przepisu ustawy podatkowej jako przesłanka stosowania klauzuli ogólnej przeciwko unikaniu opodatkowania* [Tax Benefit Being Contrary to the Object and Purpose of the Applicable Provision of the Law as Prerequisite for Polish GAAR Application], 12 Polski Przegląd Nauk Społecznych 28 (2018).

[58] H. Filipczyk, *„Sprzeczność z przedmiotem lub celem ustawy podatkowej lub jej przepisu" jako klauzulowa przesłanka unikania opodatkowania* ["Defeating the Object or Purpose of a Tax Act or its Provision" as a Determinant of Tax Avoidance under GAAR], 3 Przegląd Podatkowy 28 (2020), p. 29.

[59] *Ibidem*.

[60] *Ibidem*, p. 30.

[61] Kuźniacki, *supra* note 44, p. 34; A. Ladziński, *Zmiany w ogólnej klauzuli przeciwko unikaniu opodatkowania – powrót do przeszłości* [Changes in the General Anti-avoidance Rule: Back to the Past], 1 Przegląd Podatkowy 22 (2019), p. 26.

transposition of the directive should consist of the enactment of a law with the wording "tax law and its provision", which – somewhat paradoxically – existed before the amendment of the legislation in question. The correct approach to finding the object or purpose of the applicable tax law is to start with a specific provision and end with the tax law as a whole.[62] For this reason, the Polish transposition may raise doubts about compliance with Art. 6 of the ATA Directive.

In this case, once again, the source of the controversial phrase "tax law or its provision" can be traced to the lawmakers' pursuit of the effectiveness of the GAAR. The insertion of the conjunction "or" increases the likelihood of a positive verification of the objective test, and thus the application of the GAAR.

7. THE SUBJECTIVE TEST

Art. 6 of the ATA Directive	Art. 199a(1) of the Tax Ordinance
For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine [...].	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance). Art. 119d of the Tax Ordinance The assessment of whether gaining a tax advantage was the main or one of the main objectives of putting into place an arrangement <u>shall be made, taking into consideration the economic objectives of the arrangement indicated by the party.</u>
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

The transposition of the subjective test is far less controversial than that of the other tests. The academic discourse has mainly focussed on whether the literal transposition of the ATA Directive was appropriate in the context of a different line of jurisprudence from the CJEU. As mentioned above, the CJEU used to set the threshold at a sole or predominant purpose. "For this reason, the question arose whether the CJEU case law should be regarded as a general principle of EU law, in which case the provisions of the ATA Directive, as secondary law, would be in conflict with it..[63] Such doubts seem to have been dispelled after the new CJEU rulings in the Danish beneficial ownership cases, and the transposition should now

[62] Kuźniacki, *supra* note 38, p. 149.

[63] A. Olesińska, *Is Polish GAAR Compatible with the Directive 2016/1164 (ATAD)?*, Toruński Rocznik Podatkowy 104 (2017), pp. 111–116; Ladziński, *supra* note 61, p. 24; Kuźniacki, *supra* note 44, pp. 27–28.

be considered to be in compliance with both secondary law and CJEU case law in this respect. The shift in the CJEU's standard should be interpreted as establishing a maximum level of protection of the tax base. Therefore, similarly to the artificiality test, MSs do not appear to have the discretion to raise this standard further, in accordance with Art. 3 of the ATA Directive. It is worth noting that the Polish lawmaker has attempted to specify a subjective test, as opposed to the EU lawmaker. According to Art. 119d of the Tax Ordinance, the assessment of whether gaining a tax advantage was (one of) the main objective(s) of an arrangement shall consider the economic objectives of the arrangement as indicated by the party. In principle, it seems that this provision is largely neutral and expresses the obvious right of the taxpayer to indicate the objective behind the arrangement. Nevertheless, like any superfluous provision, it may give rise to some doubts of interpretation. Tax law has both fiscal and non-fiscal purposes. Thus, if interpreted narrowly, the provision could be seen as limiting the taxpayer's rights to indicate non-economic purposes of their activity, e.g. charitable purposes related to the use of a tax preference.[64]

As in the case of the artificiality test, the lawmaker went beyond the literal wording of the ATA Directive and undertook to further specify it in Art. 199d of the Tax Ordinance. This was an action that, in principle, should not change the understanding of the subjective test or the taxpayer's rights, but may create unnecessary interpretative doubts. The Polish legislators tried to reconcile the tendencies outlined in beginning ofthis article. The first is to correctly transpose Art. 6 of the ATA Directive, and the second is to meet the requirements of specificity arising at least ostensibly from the jurisprudence of the Constitutional Tribunal, without limiting the powers of the tax administration in the fight against tax avoidance.

8. EU LAW PERSPECTIVE

A failure to implement a directive correctly gives rise to certain obligations under EU law. First, if possible, the tax authorities are obliged to make a directive-compliant interpretation of the national regulations. A directive, by itself and without national implementation measures, cannot create obligations for individuals.[65] If this is not possible, then the authority should disregard the national regulation and

[64] M. Guzek, M. Stefaniak, *Klauzula przeciwko unikaniu opodatkowania* [General Anti-avoidance Rule], 11 Monitor Podatkowy 22 (2016), p. 26.

[65] *See e.g.* Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, paras. 12–14; Case C-168/95 *Criminal proceedings against Luciano Arcaro*, EU:C:1996:363, paras. 41–42; Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408, para. 45.

apply the directive directly, under the condition that the provisions of the directive are unconditional and sufficiently precise.[66]

The primacy and direct application of EU law is based on the principles of efficiency and loyalty.[67] The directive-compliant interpretation of the national regulation in connection with the incorrect implementation of Art. 6 of the ATA Directive is questionable in this context, and it should be considered on a case-by-case basis. For example, as indicated above in the case of the artificiality test, the Polish law both potentially expanded and narrowed the definition of artificiality in various instances. A directive-compliant interpretation of the expansion of the artificiality test is possible because it narrows the definition and, consequently, does not impose additional obligations on the taxpayer. The opposite is the case if the definition is narrowed: a directive-compliant interpretation would lead to the imposition of new obligations on the taxpayer.

Considering recent CJEU case law in the Danish beneficial ownership cases, this line of conduct should be modified. Since the prohibition of abuse of law is a general principle of the EU, it seems that the directive-compliant interpretation of the national regulation should prevail, even if it involves the imposition of new obligations on the taxpayer. The taxpayer should therefore expect that the GAAR, as in Art. 6 of the ATA Directive, will be applied in any situation.

It remains an open question whether the directive-compliant interpretation should apply only to the extent that the GAAR is harmonised by the ATA Directive (corporate taxation) or perhaps also to other areas of Polish tax law. According to the well-established doctrine in the *Dzodzi* line of cases,[68] the CJEU's jurisdiction to give a preliminary ruling is not restricted to the scope of Community law, but also extends to cases governed by national law that refer to certain Community provisions or concepts. Assuming that this doctrine also applies to the GAAR,[69]

[66] Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, EU:C:1982:7. *See also* Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, EU:C:1991:4, para. 11; Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise*, EU:C:2002:435, para. 25; Case C-138/07 *Belgische Staat v. N.V. Cobelfret*, EU:C:2009:716, para. 58.

[67] Case C-6/64 *Costa v. ENEL*, EU:C:1964:66; C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

[68] Opinion of Advocate General Mancini to Case C-166/84 *Thomasdünger GmbH v. Oberfinanzdirektion Frankfurt am Main*, EU:C:1985:208; Opinion of Advocate General Darmon to Joined Cases C-297/88 and C-197/89 *M. Dzodzi v. Belgium*, EU:C:1990:274, paras. 8–16; Opinion of Advocate General Darmon to Case C-231/89 *Krystyna Gmurzynska-Bscher v. Oberfinanzdirektion* Köln, EU:C:1990:276, paras. 5–14; Opinion of Advocate General Tesauro to Case C-346/93 *Kleinwort Benson Ltd. v. City of Glasgow District Council*, EU:C:1995:85, paras. 16–28; Opinion of Advocate General Jacobs to C-130/95 *Bernd Giloy v. Hauptzollamt Frankfurt am Main-Ost*, EU:C:1996:332, paras. 24–82; Opinion of Advocate General Jacobs to Case C-306/99 *Banque Internationale pour l'Afrique Occidentale SA (BIAO) v. Finanzamt mr GroBunternehmen in Hamburg*, EU:C:2001:608, paras. 40–71.

[69] For a discussion of various applications of the Dzodzi doctrine depending on how the GAAR is implemented, *see* A. Báez, *A PAN-European GAAR? Some (Un)Expected Consequences of the Proposed EU Tax Avoidance Directive Combined with the Dzodzi Line of Cases*, 2 British Tax Review 143 (2016).

the directive-compliant interpretation should be applied not only to corporate taxation, but also to other types of tax covered by the GAAR.

CONCLUSION

Poland has faced considerable difficulties transposing Art. 6 of the ATA Directive, particularly regarding key elements such as the genuine activity and objective tests. The deviations introduced by the Polish lawmaker share a common trait: an expansion of regulation that reflects an attempt to align with the Constitutional Tribunal's standards. However, these efforts have created a stark contradiction with the case law of the CJEU and the Directive's provisions, most notably in the artificiality test. By prioritising the Constitutional Tribunal's stringent requirements, Poland has undermined the principle of effectiveness of EU law, making the application of the GAAR outlined in Art. 6 significantly more challenging and less effective.

The Polish lawmaker deliberately avoided fully implementing the Constitutional Tribunal's judgment. Instead, it adopted vague expressions and negative definitions, only giving the appearance of compliance with constitutional standards. This approach stemmed from the fact that the full implementation of the judgment would have obstructed the introduction of an effective GAAR, including the one envisaged in Art. 6 of the ATA Directive. To reconcile these conflicting objectives, changes were made to the objective test and the artificiality test so as to enhance the GAAR's effectiveness. However, the tension between these two opposing goals – ensuring GAAR effectiveness and adhering to the Constitutional Tribunal's judgment – has resulted in the Polish GAAR being inconsistent with Art. 6 of the ATA Directive. As a consequence, the Polish GAAR is significantly more difficult to interpret than its European equivalent.

This situation stems from a fundamental clash between two distinct legal cultures. The Polish constitutional tradition gives priority to the legal certainty of the individual taxpayer over the prevention of abuse of law. This is achieved through the primacy of literal interpretation and the extensive requirements imposed by the Polish Constitutional Tribunal on the GAAR. The European legal acquis, with the case law of the CJEU on the prohibition of abuse of rights and a different approach to purposive interpretation, has moved in the opposite direction. The result of this clash of legal cultures is that there are problems correctly transposing Art. 6 of the ATA Directive in Poland.

In the EU, there is a clear consensus – both politically (embodied in the ATA Directive) and legally (as demonstrated by the Danish beneficial ownership cases) – that the GAAR is an essential tool for combating tax avoidance. However, its implementation is not without challenges. The GAAR inherently introduces

a degree of legal uncertainty, making it vital to avoid unnecessary regulations that exacerbate this uncertainty – an issue evident in the Polish GAAR. Firstly, the incorrect transposition of the Directive into Poland's legal framework has resulted in significant interpretative challenges for taxpayers navigating the law's provisions. This is particularly problematic in the context of Poland's legal tradition, which heavily relies on linguistic interpretation, leaving average taxpayers ill-equipped to adopt a directive-compliant approach. Secondly, the *Dzodzi* doctrine further complicates the landscape by raising questions about the extent to which European law should apply – whether solely to corporate tax or also to other taxes within the GAAR's scope. If the latter applies, a directive-compliant interpretation would need to extend to these additional taxes. Domestically, this scenario clashes with the constitutional principles of legal certainty and the specificity of legal provisions.

In conclusion, the case law of the Polish Constitutional Tribunal has significantly shaped the current form of the Polish GAAR – largely to its detriment. The attempt to balance legal certainty with effectiveness has resulted in an excessively complex and, in parts, misaligned implementation of Art. 6 of the ATA Directive. The Polish experience illustrates a broader lesson: not every legal instrument – particularly in the area of tax law – must elevate legal certainty above all other principles, including the prohibition of abuse. Taxpayers engaging in aggressive tax planning cannot, and arguably should not, expect complete certainty regarding the outcomes of their arrangements. This does not mean that legal safeguards should be abandoned; on the contrary, institutional and procedural mechanisms play a crucial role in ensuring fairness and predictability. Paradoxically, however, the Polish GAAR – through its overregulation and technical intricacy – offers less legal certainty than its more balanced and functional European counterpart.

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JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT of 20 January 2023 (Case no. III OSK 6651/21) [Public service, qualification proceedings and refusal of admission to the police force]

Presiding judge: SAC judge Małgorzata Pocztarek
SAC judge: Olga Żurawska-Matusiak (rapporteur)
Judge of the Voivodship Administrative Court in Krakow delegated to adjudicating in the SAC: Kazimierz Bandarzewski

The Supreme Administrative Court, on 20 January 2023, in a closed session in the General Administrative Chamber, after examining the cassation appeal filed by the Voivodship Police Commander in Katowice against the judgment of the Voivodship Administrative Court in Gliwice of 15 April 2021 (case no. III SA/Gl 80/21), in the case brought by A.Z. concerning the refusal of admission to the police force under the act of the Voivodship Police Commander in Katowice dated 24 November 2020 (no. [...]), hereby dismisses the cassation appeal.

From the following reasoning:

The Voivodship Administrative Court in Gliwice, in its judgment of 15 April 2021 (case no. III SA/Gl 80/21), after reviewing the case brought by A.Z. against the administrative act issued by the Voivodship Police Commander in Katowice on 24 November 2020 (no. [...]), concerning the refusal of admission to the police force, annulled the contested act. The judgment was based on the following factual circumstances of the case: the Voivodship Police Commander (hereinafter referred to as "the Authority"), through an administrative act dated 24 November 2020 (no. [...]), informed A.Z. (hereinafter referred to as "the Complainant") of the decision

to discontinue the qualification proceedings regarding her candidacy for service on the police force.

According to the administrative case files, the Complainant submitted to the County Police Headquarters an application for admission to police service on 22 July 2020 to. Along with the application, the required documents prescribed by law were submitted. These documents, upon being forwarded in accordance with jurisdiction to the Voivodship Police Headquarters in Katowice, provided the basis for initiating qualification proceedings. The qualification proceedings were conducted pursuant to Article 25 of the Act of 6 April 1990 on the Police (Journal of Laws of 2020, item 360 as amended, hereinafter: the "Police Act") and the Regulation of the Minister of Internal Affairs of 18 April 2012 on the qualification proceedings for candidates applying to the police force (Journal of Laws of 2012, item 432 as amended, hereinafter: the "MIA Regulation"). The subsequent stages of the qualification process, including verification of documents, validation of submitted data, a knowledge test, a physical fitness test and a psychological evaluation, were completed with positive results.

Simultaneously, as part of the qualification proceedings, actions were undertaken to verify that the candidate had no criminal record and had an impeccable reputation. Additionally, a vetting process was initiated as prescribed by regulations on the protection of classified information (Article 25(2)(8) of the Police Act and §10(8) of the MIA Regulation).

According to an official note written on 19 November 2020 by a representative of the County Police Commander, concerning the standard vetting procedure conducted with respect to the Complainant's application to the police force, it was revealed that she resides with her brother. The brother had repeatedly been a suspect in criminal proceedings, had been convicted of burglary and was frequently detained by the police for possession of narcotic substances. Indictments were issued against him for the following offences: engaging in sexual activity with a minor under the age of 15, driving a vehicle under the influence of alcohol or similar intoxicants, supplying narcotics to a minor, insulting a public official and property damage. Additionally, he was identified as the perpetrator of various traffic violations and had been placed in pre-trial detention. The Complainant's father's name also appeared in documents related to criminal proceedings conducted by the police, involving allegations of making criminal threats and domestic abuse.

Subsequently, the Complainant was informed via telephone and later in writing that the Authority had withdrawn her from the qualification proceedings, determining that this decision was justified by a lack of demand for personnel on the police force. Upon learning via telephone about her withdrawal from qualification proceedings, the Complainant submitted a letter to the administrative

body requesting reconsideration of her case and admission to the further stages of qualification. In her submission, she acknowledged that her brother had been convicted of stealing wire or cable and sentenced to imprisonment with a conditional suspension. He then ceased contact with his probation officer as he left for work, which led to the execution of his sentence. Nevertheless, he was quickly released from the penitentiary and served the remainder of his sentence under an electronic monitoring system. She emphasised that her brother was not and had never been a member of any subculture or organised group. She argued that she should not bear the negative consequences of mistakes her brother had made.

In a letter dated 1 December 2020, the Authority informed the Complainant that the regulations governing the police recruitment procedure, specifically the Police Act and the MIA Regulation, do not provide an option to appeal a decision to withdraw a candidate from qualification proceedings. These legal acts grant the Authority the right to do so when there is no justification for pursuing such proceedings due to the staffing needs of the police. The Authority additionally clarified that recruitment is conducted individually for each candidate, and decisions are contingent upon the specific circumstances of each case.

The Complainant subsequently submitted three additional letters to the Authority, requesting the reconsideration of the matter and a change of the decision. She argued that the staffing needs of the police were significant and unmet, and she requested further clarification on why her qualification proceedings had been discontinued.

In response, in a letter dated 18 December 2020, the Authority explained the legal grounds for its decision, citing Article 25(5)(7) of the Police Act. It was further stated that the evidence gathered during the qualification proceedings and the results of its analysis supported the conclusion that there was no justification for continuing the qualification process in view of the police force's staffing needs. The Authority also stated that there were no legal grounds either to appeal the decision which terminated the qualification proceedings or to resume such proceedings.

In her complaint to the Voivodship Administrative Court in Gliwice, the Complainant challenged the Authority's letter of 1 December 2020.

In response to the complaint, the Authority requested its dismissal.

The Voivodship Administrative Court in Gliwice held that the complaint warranted consideration.

The court of first instance recalled that the Complainant, on 20 July 2020, had submitted an application to join the police force, accompanied by the required documents, and had undergone the qualification process. According to the evaluation sheet, she successfully completed subsequent stages of the qualification process, including the non-scored stages of document verification and fact-checking and

the scored stages of a knowledge test and a physical fitness test on 11 October 2020 and a psychological test on 3 November 2020, all concluded with positive results.

Despite her performance, on 24 November 2020, she was informed that the qualification proceedings for her admission to the police force had been discontinued, as it was deemed unnecessary for the staffing needs of the police. Despite directing numerous letters to the Authority, the Complainant did not receive an explanation regarding the reasons for discontinuing the qualification proceedings in her case.

In the opinion of the court of first instance, the allegations in the complaint regarding violations of Articles 7, 77 and 107 §3 of the Code of Administrative Procedure, as well as Article 25(2)(7) of the Police Act, were upheld. The Authority, when issuing the contested decision, repeatedly referred in its subsequent correspondence with the Complainant to Article 25(5)(7) of the Police Act. However, the phrasing in this provision, "does not find justification in the staffing needs of the police", is vague and has not been defined in the legal provisions. Additionally, the provision does not authorise the issuance of an administrative act devoid of legal and factual justification.

The court of first instance emphasised that the contested administrative act dated 24 November 2020 lacked both legal and factual justification. Only in subsequent correspondence with the Complainant and in its response to the complaint did the administrative body refer to Article 25(5)(7) of the Police Act and § 40 of the MIA Regulation as the legal basis for its decision. Since the discontinuation of qualification proceedings pursuant to Article 25(2)(7) of the Police Act constitutes an administrative act related to rights derived from legal provisions and falls under the jurisdiction of the administrative court, the police authority was obliged under the Code of Administrative Procedure to thoroughly substantiate this decision.

Moreover, a candidate for the police force, for whom such an act is issued, has the right to receive a detailed explanation as to why the qualification proceedings were discontinued in their particular case.

The court of first instance emphasised that the administrative body, in re-conducting the proceedings, should adhere to the instructions set forth by the court. For this purpose, the administrative body must re-analyse the evidence gathered in the case, particularly the official note dated 19 November 2020 from the attorney of the County Police Commander regarding the routine background check for the police force candidate. Subsequently, the Authority must demonstrate what, in its opinion, justified the discontinuation of the qualification proceedings. If the administrative body deems it necessary to issue an act based on Article 25(2)(7) of the Police Act, it must properly substantiate it.

Disagreeing with the foregoing judgment, the Authority appealed the judgment in its entirety to the Supreme Administrative Court. In its cassation appeal, the

Authority alleged that the judgment violated substantive law due to the incorrect interpretation of the following provisions:

a) Article 25(5)(7) of the Police Act, through the assumption that this provision imposes a requirement on the public administrative body issuing an act as described in Article 3(2)(4) of the Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws of 2019, item 2325, hereinafter "LPAC") to conduct an exhaustive evidentiary procedure in order to provide the candidate with detailed justification as to why the qualification proceedings were discontinued in their specific case. The administrative body argued that this provision merely confers authority upon the entity identified in the statute to discontinue qualification proceedings for a candidate applying to the police force if such proceedings are unjustified based on the police's staffing needs, which was in fact presented in the act challenged before the Voivodship Administrative Court.
b) § 40(1b)(3) and § 40(1c) of the MIA Regulation, through the assumption that these provisions impose an obligation to provide a factual and legal justification for an act. The administrative body contended that these provisions do not require such justification as part of the act since the written information under these provisions that is provided during this stage of the qualification process is not an administrative decision. As such, it does not necessitate that factual findings and legal grounds be established, nor detailed explanations be given to the addressee. Instead, it constitutes an exercise of the discretionary administrative authority within the qualification proceedings, as an act of public administration, which does not require a detailed legal and factual justification.

Citing these alleged violations, the Authority requested the revocation of the judgment under appeal and the resolution of the case in accordance with Article 188 of the LPAC, by dismissing the complaint. Additionally, the administrative body petitioned for the litigation costs, including the costs of legal representation, to be awarded to the appellant. [...]

The Complainant, in her pleading filed on 12 July 2021, requested the dismissal of the cassation appeal and the awarding of litigation costs, including the costs of legal representation, against the administrative body in favour of the complainant, in accordance with the statutory standards.

[...]

The Supreme Administrative Court held as follows:

[...]

The essence of the allegations in the cassation appeal revolves around the question of whether an administrative act informing an individual applying for admission to

the police force that the qualification proceedings against them have been discontinued should be substantiated. First and foremost, it must be emphasised that in this case, there is no dispute regarding the classification of the Authority's letter of 24 November 2020 to the Complainant, which informed her that the Authority had discontinued the qualification proceedings regarding her application, deeming that such proceedings were not justified by the staffing needs of the police. This letter is classified as an act within the realm of public administration.

This act falls within the category of acts described in Article 3 § 2 point 4 of the LPAC and is subject to judicial review by an administrative court. Such acts are of an external nature, directed towards an individual outside the organisational structure of the public administration body, and they concern rights derived from legal provisions.

A favourable outcome of the qualification proceedings enables a candidate to establish a service relationship of a public-law nature. Conversely, discontinuing the qualification proceedings of a particular candidate signifies their termination. The qualification procedure regarding admission to the police force has the nature of administrative proceedings.

The issue concerning the necessity of providing reasoning for an act regarding the discontinuation of qualification proceedings for service in the police force has already been considered in the case law of the Supreme Administrative Court – see e.g. judgments of the Supreme Administrative Court of 7 July 2009 (case no. I OSK 1219/08) and of 4 July 2014 (case no. I OSK 3044/12). When these rulings were issued, different executive regulations governing qualification proceedings for police force candidates were in force. Nevertheless, the assessment within the rulings regarding the obligation to provide a written explanation of the reasons for discontinuing qualification proceedings remains valid under the legal provisions in effect when the contested act was issued.

In adjudicating the matter at hand, it should be noted that Poland ratified the International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly on 19 December 1966) on 3 March 1977, subsequently publishing it in the Journal of Laws. Article 25(c) of the Covenant provides that every citizen has the right and the opportunity, without any discrimination and without unreasonable restrictions, to perform public service in their country on the basis of equality. This principle directly corresponds with the relevant provisions of the Constitution of the Republic of Poland, Article 60 of which states that "Polish citizens enjoying full public rights shall have the right to access public service on equal terms". This provision does not guarantee acceptance into public service, however, as the legislature is authorised to establish additional conditions and to make the attainment of specific public service positions contingent upon

meeting these conditions, according to the nature and essence of those positions. Furthermore, public authorities are required to determine the number of positions to be filled depending on the needs of the state. Nonetheless, this provision ensures equality of opportunity for individuals seeking to undertake public service. On the one hand, it obliges the legislature to establish substantive legal regulations that outline transparent criteria for the selection of candidates and the filling of specific public service positions. On the other hand, it mandates the creation of procedural guarantees that enable the verification of decisions concerning recruitment to public service. Consequently, the interest protected here is the transparency and openness of the rules defining the requirements for occupying a specific role. The absence of appropriate control and appellate procedures can pose a significant obstacle to the application of established rules and can lead to a violation of the constitutional requirement of equal treatment for those seeking access to public service on the same terms (see judgments of the Constitutional Tribunal of 9 June 1998 [case no. K. 28/97, OTK ZU no. 4/1998, item 50]; of 14 December 1999 [case no. SK 14/98, OTK ZU no. 7/1999, item 163]; and of 8 April 2002 [case no. SK 18/01, OTK ZU no. 2/A/2002, item 16]). Additionally, it must be emphasised that in its judgment of 29 November 2007 (case no. SK 43/06), the Constitutional Tribunal expressed the view that "Article 60 of the Constitution constitutes the source of precisely defined constitutional subjective rights that must be respected by public authorities."

The right to access to service in the police force has been codified in the relevant provisions of the Act on the Police and the cited provisions of the [MIA] regulation. A candidate for service in the police force is therefore entitled to request the administrative court to review any act that terminates the candidate's qualification proceedings. Such a decision directly impacts their constitutional rights and freedoms, specifically the right to access to public service.

The reason for terminating the qualification proceedings must comply with the constitutional principle of access to public service, which stipulates that if for any reason a candidate does not meet the defined criteria, they must be informed accordingly and must know the reasons why they were not accepted. The legislature has not imposed a formal obligation to justify the termination of qualification proceedings, as there is no specific requirement for such an act to take the form of a formal decision. However, this does not preclude the court from deriving the conclusion that written notification, informing the candidate of the termination of their consideration for service, constitutes an administrative act. The issuance of this act, which is linked to the assessment of the statutory criteria by a superior, requires justification.

It should be emphasised that the administrative court reviews an administrative act based on the criterion of legality, which encompasses verification of not only

whether the act was based on legal grounds, but also whether the authority in question acted within the limits of the law. The actions of public authorities must be based on and confined to legal limits, which is a constitutional principle enshrined in Article 7 of the Constitution of the Republic of Poland. In this case, the legal boundaries of the Authority's actions are defined by the statutory criteria considered in the course of the qualification proceedings. Without knowledge of the reasoning behind the Authority's decision-making in respect of the individual circumstances of a candidate, it is not possible to conduct a full review of the contested act.

The obligation to provide justification can also be inferred from the nature of the aforementioned act, which is similar to an administrative decision that requires justification under the Code of Administrative Procedure. Termination of the qualification proceedings prevents the candidate from establishing a public-law service relationship. Such a conclusion may be reached analogously from the Code of Administrative Procedure.

[...]

Given that the Code of Administrative Procedure, in Article 107 §3, imposes the duty to duly justify decisions, it follows by analogy that there is an obligation to provide adequate reasoning for authoritative acts in the realm of public administration that are not decisions, but still pertain to the rights of an individual entity.

By not explaining the reasons for a decision, administrative acts evade judicial/administrative review, which is unacceptable from the perspective of the requirements of the rule of law (Articles 2 and 7 of the Constitution of the Republic of Poland), as well as the constitutional right to a court hearing (Article 45 of the Constitution of the Republic of Poland) and judicial review of public administration activities (Article 184 of the Constitution of the Republic of Poland).

This leads to the conclusion that the position of the court of first instance was correct, according to which a candidate for service on the police force is entitled to a detailed explanation of the reasons why their qualification proceedings were discontinued. In this case, such information seems particularly important when considering that the appellant was informed that the qualification proceedings were discontinued because the police force did not need personnel, despite the well-known police personnel shortages: the case files contain materials indicating that there were 600 vacancies in the Silesian Police Garrison during the relevant period. As such, the criterion of personnel needs must be related to the circumstances established in the case and arising from the qualification proceedings. It is insufficient to merely invoke one of the grounds provided by the Act on the Police for discontinuing the qualification proceedings for a given candidate, especially when the Authority did not state the legal basis for its actions. The absence of any factual determinations or the Authority's reasoning prevents the administrative

court conducting a review of the actions undertaken in the matter. If the Authority's position that it is not required to explain why it decided to discontinue the qualification proceedings in a given case were accepted as correct, judicial review of the act issued in this respect would be illusory.

For all the above reasons, the Supreme Administrative Court, recognising the allegations of the cassation appeal as unfounded, dismissed the cassation appeal pursuant to Article 184 of the LPAC.

JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT of 4 April 2023 (Case no. III OSK 2062/21) [Restrictions on the exercise of constitutional freedoms and rights of individuals called to military service; assigning civilian duties to a person following a declaration of mobilisation and during wartime, involving immediately reporting to the Port Command for the purpose of evacuating persons, versus the conscience clause; the scope of protection arising from the freedom of conscience and religion]

Presiding judge: SAC judge Małgorzata Masternak-Kubiak (rapporteur)
SAC judge: Piotr Korzeniowski
Judge of the Voivodship Administrative Court in Krakow delegated to adjudicating in the SAC: Mariusz Kotulski

The Supreme Administrative Court, after examining on 4 April 2023, in a closed session in the General Administrative Chamber, the cassation appeal of P.B. against the judgment of the Voivodship Administrative Court in Szczecin, dated 24 July 2019 (case no. II SA/Sz 451/19), in the case of the complaint of P.B. against the decision of the West Pomeranian Voivode dated 10 December 2018 (no. […]) regarding the assignment of civilian duties for defence purposes, hereby adjudicates: 1. The cassation appeal is dismissed. […]

From the following reasoning:

The Voivodship Administrative Court in Szczecin, by its judgment of 24 July 2019 (case no. II SA/Sz 451/19) dismissed the complaint of P.B. against the decision of the West Pomeranian Voivode dated 10 December 2018 (no. [...]), regarding the assignment to perform civilian duties for defence purposes.

As stated by the court of first instance, by the decision dated 27 September 2018 (no. [...]), the Mayor of Ś., referring to Article 203(1) of the Act of 21 November 1967 on the Common Obligation to Defend the Republic of Poland (consolidated text: Journal of Laws of 2017, item 1430, as amended) – hereinafter referred to as the "Common Defence Act" – ruled to assign civilian duties to P.B. in the event of a declaration of mobilisation and during wartime. These duties involve the immediate appearance at the Port Command for the purpose of assisting with the evacuation of individuals. In the reasoning for the decision, the authority indicated that, in accordance with Article 200(1) of the Common Defence Act, Polish citizens aged between sixteen and sixty years can be subjected to the obligation to perform various ad hoc tasks aimed at preparing the state's defence, combating natural disasters or mitigating their effects. The party satisfies the aforementioned requirements [i.e. Art. 200 (1) of the Common Defence Act] and did not submit to the authority any document confirming grounds for exemption from this obligation under Article 206a(1) of the Common Defence Act. The authority further noted that the Army Recruiting Commandant, when specifying in the application the need to impose this obligation upon the party, defined it as appearing and assisting with the evacuation of individuals. This type of task, essentially protecting citizens' safety, does not contradict the arguments raised by the party in his submission, particularly regarding the assistance which his religious organisation offers to others in the case of natural disasters.

In the [administrative] appeal against the decision and in its supplement, the appellant primarily argued that the decision was contrary to his conscience and the moral principles he adheres to as a Jehovah's Witness. Following an examination of the case resulting from the appeal, the West Pomeranian Voivode, by a decision dated 10 December 2018, upheld the contested decision. P.B. filed a complaint against this decision with the Voivodship Administrative Court in Szczecin. In response to the complaint, the Voivode petitioned for its dismissal or, alternatively, its rejection.

The court of first instance [...] determined that the complaint lacked justified grounds. In its assessment, the adjudicating authorities in the case correctly established that the prerequisites justifying the acceptance of the Army Recruiting Commandant's application had been met. The complainant holds Polish citizenship, is between the ages of sixteen and sixty years, and is not in one of the categories of

individuals excluded from the obligation to perform civilian duties under Article 206a of the Common Defence Act. Consequently, the adjudicating authorities in the case had no legal basis to take into account the complainant's individual situation, as indicated by him, regarding his conscientious objection to performing such duties for defence purposes.

Responding to the complainant's allegations of violations of the Constitution of the Republic of Poland, the court observed that the Constitution does not contain any general provision that directly addresses the issue of conscientious objection. The right to act in accordance with one's convictions arises from the general principle of human freedom (Article 31(1) of the Constitution); however, this principle is subject to limitations imposed by law (second sentence of Article 31(2) of the Constitution). Pursuant to Article 31(3) of the Constitution, such limitations must not exceed what is necessary from the standpoint of the needs of defence (national security). The issue of conscientious objection to obligations imposed by law is expressly regulated only with respect to military service. A citizen whose religious beliefs or moral principles prevent them from performing such service may be required to undertake alternative service, as provided for by statute (Article 85(3) of the Constitution). Therefore, it cannot be asserted that the framers of the Constitution ignored the issue of conscientious objection. They chose to regulate it only within a limited substantive scope and in the section of the Constitution dedicated to individual obligations, correctly recognising the possibility of refusing military service as an exception to the universal duty of defending the homeland.

This case does not concern military service, but rather the obligation to perform civilian duties for defence purposes. According to the Voivodship [Administrative] Court, these two forms of fulfilling the civic duty of defence cannot be equated. The nature of these obligations, their duration and the applicable governing regulations are entirely different and are subject to separate implementing provisions.

The court of first instance stated that, in a judgment delivered by the Grand Chamber of the European Court of Human Rights (ECtHR) in the case of *Bayatyan v. Armenia* (ECtHR judgment of 7 July 2011, application no. 23459/03), the court highlighted the existence of a common legal standard among the member states of the European Convention on Human Rights (ECHR). This standard acknowledges the acceptance of conscientious objection to military service on religious grounds and imposes a requirement to provide an alternative form of such service. One of the arguments supporting this position referred to Article 10(2) of the Charter of Fundamental Rights of the European Union (CFR). Although the CFR imposes a positive obligation on states to ensure that individuals have the right to refuse to act against their conscience, it also allows individual states the discretion to determine the scope of this right, the criteria for its exercise and

the consequences of such objection. These consequences, in practice, may include the obligation to perform some form of alternative (substitute) military service. Thus, the manner in which this right is exercised is entrusted to the discretion of the state and its domestic legislation. The aforementioned ECtHR judgment, as well as other decisions cited by the complainant in the supplementary complaint filing, strictly pertain to the issue of conscientious objection to military service. However, the complainant was not required to undertake military service under the contested decision.

Additionally, in the opinion of the [Voivodship Administrative] Court *meriti*, freedom of conscience and religion does not include an unrestricted right to act upon the dictates of conscience in every sphere of social life. Such limitations are expressly provided for in Article 31(3) of the Constitution, which allows for restrictions when they are "necessary in a democratic society"; they comply with "national laws regulating the exercise of this right"; or they are "prescribed by law" and are "necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others". According to the Voivodship [Administrative] Court, the imposition on the complainant of the obligation to perform civilian duties, such as evacuating people in the event of war or a declaration of mobilisation for a period of seven days, does not infringe on his freedom of conscience and religion due to the nature of these activities. Furthermore, this obligation aligns with one of the stated aims of Jehovah's Witnesses: providing assistance to others. Therefore, the contested decision does not violate Article 9 of the European Convention on Human Rights, Article 18 of the International Covenant on Civil and Political Rights, Article 10 of the CFR or the Constitution.

Since the allegations in the complaint were found to have no justified basis, the complaint was dismissed pursuant to Article 151 of the Act of 30 August 2002 – Law on proceedings before administrative courts (consolidated text: Journal of Laws of 2018, item 1302, as amended; hereinafter "LPAC").

P.B. filed a cassation appeal against the above-mentioned judgment [of the Voivodship Administrative Court in Szczecin]. In challenging the decision of the court of first instance in its entirety, [the appellant] alleges the following violations.

1. Violations of substantive law, specifically:
   a) Article 53(1) of the Constitution in conjunction with Article 206a of the Act on the Common Obligation to Defend the Republic of Poland [...], Article 178(1), and Article 8(2) of the Constitution, due to an incorrect interpretation and, consequently, improper application, leading to the conclusion that the imposition of the obligation to perform civilian duties does not restrict the appellant's right to freedom of conscience and religion

The appellant argues that neither the court of first instance nor the administrative authorities considered that performing civilian duties would infringe on his freedom of conscience and create a real possibility of violating his right to freedom of conscience and religion. The court and authorities should have adopted a pro-constitutional interpretation of Article 206a of the Common Defence Act, broadening the category of individuals exempted from this obligation to include those invoking Article 53(1) of the Constitution. Article 53 of the Constitution is applicable on the basis of Article 178(1) and Article 8(2) of the Constitution, and the court failed to consider this constitutional right.

b) Article 9 of the ECHR, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the Charter of Fundamental Rights of the European Union (Charter), in conjunction with Articles 91(1) and (2), 178(1) and 8(2) of the Constitution and Article 206a of the Common Defence Act, due to their improper interpretation and application.

   The appellant contends that these provisions primarily establish the fundamental right to freedom of conscience and religion. While he acknowledges the possibility of limiting these rights to the extent allowed by law (e.g. Article 9(2) of the ECHR or Article 18(3) of the ICCPR), such limitations only pertain to the external manifestation of religion or beliefs, not to the violation of freedom of conscience itself. Performing the civilian duties, in the appellant's situation, would directly infringe on his freedom of conscience and likely his freedom of religion, as safeguarded by Article 9(1) of the ECHR, Article 18(1) of the ICCPR, Article 10 of the Charter and Article 53(1) of the Constitution.

   The court and administrative authorities should therefore have applied a pro-constitutional interpretation of Article 206a of the Common Defence Act, recognising that freedom of conscience and religion is directly derived from the aforementioned international and constitutional provisions, which take precedence over the statutory rule in Article 206a of the Common Defence Act. These provisions could have been applied directly pursuant to Articles 91(1) and (2), 178(1) and 8(2) of the Constitution.

c) Article 85(1) of the Constitution, in conjunction with Article 206a of the Common Defence Act and Articles 53(1), 178(1) and 8(2) of the Constitution, due to an incorrect interpretation and improper application, resulting in the conclusion that the obligation to defend the homeland under Article 85(1) of the Constitution by carrying out these civilian duties is superior to the appellant's right to freedom of conscience and religion

   The appellant argues that the right to freedom of conscience and religion is equally as significant as the obligation to defend the homeland. The court

and administrative authorities should have interpreted Article 85(3) of the Constitution to allow for exemptions from military service (as a qualified form of homeland defence) or civilian obligations for conscientious or religious reasons. Article 85(3) does not preclude such exemptions or their limitation based on constitutional principles. Consequently, the appellant submits that it is possible to release individuals from homeland defence duties without imposing substitute service obligations if justified by their right to freedom of conscience or religion.

d) Article 206a of the Common Defence Act in conjunction with Article 87(1) of the Constitution, Article 53(1) of the Constitution, Article 9 of the ECHR, Article 18 of the ICCPR and Article 10 of the Charter, due to an incorrect interpretation – the application of Article 206a of the Common Defence Act was based on the finding that the catalogue of individuals exempted from the obligation to perform civilian duties is exhaustive, contrary to a constitutional interpretation in harmony with ratified international agreements.

The appellant contends that the above-mentioned provisions of the Constitution, the ECHR, the ICCPR and the Charter represent superior sources of law in relation to the Common Defence Act and should have been directly applied under Articles 178(1), 8(2) and 91(1) and (2) of the Constitution. The authorities and the court failed to recognise that their correct application should take precedence, ensuring the protection of freedoms of conscience and religion.

The appellant therefore seeks to demonstrate that the court and the administrative authorities committed substantive legal errors in their interpretation and application of both domestic and international law, specifically in failing to adopt a pro-constitutional and rights-based approach to resolving the conflict between obligations under the Common Defence Act and constitutional/international guarantees of freedom of conscience and religion.

2. Violation of procedural provisions which could have had a significant impact on the outcome of the case

Specifically, the appellant alleges violations of Article 3 §1 and Article 145 §1(1) (a) and (c) of the LPAC, due to the finding of the court of first instance that the authorities had thoroughly analysed the factual circumstances of the case. The appellant argues that the following factors were omitted:

- performing the planned civilian duties in the event of mobilisation or during wartime would contradict the appellant's moral principles, conscience and deeply held and genuine religious beliefs;
- performing such duties would cause a "strong and insurmountable conflict" between the obligation to perform them and the appellant's "conscience or

deeply held and genuine religious beliefs", thereby directly violating Article 77 §1 of the Code of Administrative Procedure (CAP) in conjunction with Article 7 of the CAP, as well as Article 80 of the CAP in conjunction with Article 7 of the CAP.

On the basis of the above claims, the appellant petitioned for the contested judgment to be repealed in its entirety, pursuant to Article 185 of the LPAC, and the case to be remanded to the Voivodship Administrative Court for reconsideration [and for] the costs of the proceedings, including the costs of legal representation and the stamp duty for the power of attorney, to be awarded in accordance with Article 203 of the LPAC, based on statutory standards [...].

The grounds for the cassation complaint were elaborated in greater detail in the justification. In response to the cassation complaint, the West Pomeranian Voivode petitioned for its dismissal [and] the awarding of the costs of proceedings, including the costs of legal representation, pursuant to statutory standards [...].

The Supreme Administrative Court held as follows:

The cassation appeal does not contain justified grounds.

[...]

Contrary to the cassation allegations, the assessment of the Voivodship Court expressed in the contested judgment does not violate Article 206a of the Common Defence Act, in conjunction with Articles 53(1), 85(1), 87(1) and 178(1) of the Constitution, nor Article 8(2) of the Constitution.

The Voivodship Court's decision could not be undermined by the cassation allegations based on Article 9 of the ECHR, Article 18 of the ICCPR and Article 10 of the CFR, in conjunction with Article 91(1) and (2), Article 178(1) and Article 8(2) of the Constitution.

Referring to the above allegations, it must be stated that neither the constitutional provisions nor the provisions of international legal acts cited as the basis for the cassation claim could serve as a basis for exempting the complainant from the obligation to perform civilian duties for national defence (Article 200 of the Common Defence Act) on the grounds of objections stemming from conscience, moral principles or spiritual life.

The essence of the dispute in the case, which was resolved by the contested judgment, concerns the conflict between the complainant's obligation to perform civilian duties under the universal obligation to defend the Nation – established by the provisions of Article 85(1) of the Constitution and Article 4 of the Common Defence Act – and the complainant's ideological and spiritual convictions and conscience, which are safeguarded by Article 53(1) of the Constitution and international legal acts.

The court of first instance appropriately noted that Article 18(3) of the ICCPR and Article 9(2) of the ECHR provide for statutory limitations on the rights to freedom of thought, conscience and religion. In the Polish legal system, the Act on Administrative Procedure is such a law. Furthermore, Article 9(2) of the ECHR and Article 18(3) of the ICCPR stipulate that the freedom to manifest one's religion or beliefs may be subject to restrictions prescribed by law, as necessary in a democratic society for public safety, public order, health or morals, or the protection of the fundamental rights and freedoms of others.

Given these regulations, it is beyond doubt that obligations imposed on Polish citizens under the [Common Defence Act] may lead to limitations on the "freedom to manifest one's religion or beliefs". Moreover, Article 10(2) of the CFR recognises the right to conscientious objection in accordance with national laws governing the exercise of this right. Notably, the language of the provision does not acknowledge an absolute right to "refuse actions contrary to one's conscience", because the exercise of this right must align with national laws.

In this case, as the court of first instance rightly pointed out, Article 206a of the [Common Defence Act] does not include in its catalogue of exemptions from the obligation to perform civilian duties a situation where an individual designated to perform such duties invokes the "right to refuse actions contrary to one's conscience".

It should be emphasised that Article 10(2) of the CFR protects the right to conscientious objection; however, the exercise of this right must occur within the framework established by national laws. In legal doctrine and case law, two dimensions of freedom of thought, conscience, and religion are distinguished: internal freedom (*forum internum*) and external freedom (*forum externum*). Consequently, it is inferred that while internal freedom cannot be subject to any limitations, external freedom – which involves the expression of one's beliefs – must in some cases be subject to restrictions (see the reasoning of the judgment of the Constitutional Tribunal of 7 October 2015 (case no. K 12/14 OTK-A 2015, no. 9, item 143).

For the purposes of these deliberations, it should be clarified that conscientious objection, sometimes referred to as the conscience clause, is defined as "the right to act in accordance with one's own conscience and, consequently, also the freedom from coercion to act contrary to one's own conscience" (see P. Stanisz, *Klauzula sumienia* [Conscience clause], in: *Prawo wyznaniowe* [Church-State law], A. Mezglewski, H. Misztal, P. Stanisz, Warsaw 2011, p. 104).

In connection with the arguments presented in the cassation complaint, it is necessary to observe that in Strasbourg case law, the issue of conscientious objection has been considered in the context of the right to refuse military service. A line of jurisprudence has been developed, starting with the judgment cited in the cassa-

tion complaint, *Bayatyan v. Armenia* (application no. 23459/03) of 7 July 2011, in which the ECtHR held that, under certain conditions, opposition to military service could fall under the guarantees provided by Article 9 of the ECHR. This position concerned a Jehovah's Witness and their obligation to perform military service. Thus, it cannot be directly referred to in this case, which concerns an obligation to perform civilian duties.

It is worth noting the opinion expressed in the legal literature that "[t]he aforementioned ECHR judgment relates strictly to the issue of refusing military service and does not contain general assertions that could be interpreted as 'opening' Article 9 of the ECHR to all cases of objecting to behaviour required by law but contrary to individual beliefs" (W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia – po wyroku Trybunału Konstytucyjnego* [The Right of a doctor to conscientious objection: Following the judgment of the Constitutional Tribunal], Państwo i Prawo 2017, no. 7, pp. 23–26).

In light of the above, it is reasonable to infer that according to the standard established by the provisions of those international legal acts, the guaranteed protection of freedom of conscience and religion does not apply to every conflict between beliefs and a legal obligation. The right to conscientious objection is exercised within the framework established by national law. It should also be emphasised that international legal acts, as well as the jurisprudence of the Strasbourg Court, set guidelines for the interpretation of norms applicable within the domestic legal order, which had to be taken into account when examining the case at hand.

Referring to the national legal order, it should be noted that under Article 53(1) of the Constitution of the Republic of Poland, everyone is guaranteed freedom of conscience and religion. According to the allegations raised in the cassation complaint, this particular provision should serve as the standard for a pro-constitutional interpretation of Article 206a of the Act on Administrative Procedure, and consequently, as the basis to exempt the complainant from the obligation to perform civilian duties that are contrary to his conscience and religious beliefs.

When addressing the arguments made by the complainant, it must first be pointed out that the cassation complaint emphasises the complainant's rights derived from Article 53(1) of the Constitution, which protects freedom of conscience and religion. However, it omits the relationship of this provision with other constitutional norms that allow the exercise of constitutional freedoms and rights to be limited. Specifically, within Article 53(5) of the Constitution, the framers of the constitution provided that the freedom to manifest religion may only be restricted by statute, and solely when necessary to protect the security of the state, public order, health, morality or the freedoms and rights of others.

Similarly, as regards freedom of conscience, Article 31(3) of the Constitution should be taken into consideration, which stipulates that limitations on the exercise of constitutional freedoms and rights may only be imposed by law and exclusively when necessary in a democratic state to ensure its security or public order or to protect the environment, health, societal morality or the freedoms and rights of others. Such limitations must not infringe upon the essence of freedoms and rights.

The Constitutional Tribunal, in its judgment of 7 October 2015 (case no. K 12/14) – following international regulations and the widely accepted interpretation of constitutional provisions – held that the freedom of conscience expressed in Article 53(1) of the Constitution may be subject to certain limitations. However, such limitations must be appropriately proportionate, meaning they must meet the criteria set out in Article 31(3) of the Constitution.

This case undoubtedly involves a constitutional conflict of values. On the one hand, the complainant, invoking freedom of conscience and religion, demands exemption from the obligations imposed by the contested decision. On the other hand, administrative authorities point to the Common Defence Act and Article 85 of the Constitution as the legal basis for imposing on the complainant a universal obligation to defend the homeland.

The arguments in the complaint and the cassation appeal that the obligations imposed on the complainant under the universal obligation of defence constitute a limitation on their rights derived from freedom of conscience and religion are valid. However, the key issue in this case is to determine whether these limitations comply with the requirements of Article 31(3) and Article 53(5) of the Constitution. As noted by the Constitutional Tribunal in its judgment (case no. K 12/14), the principle of proportionality expressed in Article 31(3) allows for the resolution of situations where multiple constitutionally protected rights conflict or where legislative interference made to protect one constitutional value causes an excessive limitation on another value within the same category. Article 31(3) sets out universal criteria that must be met to impose restrictions on individuals' constitutional rights and freedoms.

The focus in this case was primarily on the relationship between Article 53(1) and (5) and Article 85 of the Constitution. From Article 53, it can be inferred that everyone has the freedom to embrace religious, moral or ideological convictions, and to express them through their own behaviour. The Constitutional Tribunal, in the aforementioned judgment, stated that the right to act according to one's conscience, and consequently the right to refuse to act against one's conscience, is embodied in the concept of conscientious objection or a conscience clause. The Tribunal stated that "freedom of conscience must manifest itself in the possibility of refusing to perform a duty imposed by law by invoking scientific, religious, or

moral beliefs." Notably, the Constitutional Tribunal had already, in its judgment of 15 January 1991 (case no. U 8/90, OTK 1991, item 8), recognised that freedom of conscience does not merely mean the right to hold certain views, but also involves the right to act according to one's conscience and to be free from coercion to act against one's conscience.

With regard to conscientious objection, it is important to note that neither international standards nor the constitutional context allow Article 53(1) of the Constitution to be interpreted as creating a general right to refuse to comply with the law in every situation where legal requirements conflict with an individual's conscience. The protection arising from freedom of conscience and religion is not unlimited and does not apply to every instance of a conflict between beliefs and a legal obligation.

The framers of the Constitution, recognising the issue of conscientious objection, decided to regulate it in a narrow scope, namely through the possibility of refusing military service. Pursuant to Article 85(3) of the Constitution, a citizen whose religious convictions or moral principles do not allow them to perform military service may be required to undertake alternative civilian service under conditions specified by law. This provision constitutes an exception to the universal obligation to defend the homeland, as established in the Constitution. According to Article 85(1) of the Constitution, the obligation to defend the Republic of Poland applies to all its citizens.

From the entirety of the regulations contained in the Common Defence Act, the broadest set of responsibilities within the scope of the universal obligation of defence is associated with performing military service. This service naturally entails corresponding limitations on the exercise of constitutional freedoms and rights by the individuals called to such service. While performing obligations in support of national defence represents one form of the universal obligation of defence, it differs significantly from military service – a distinction that is reflected at the constitutional level in Article 85(3). The constitution's limiting the legal protection solely to cases of conscientious objection in the context of military service provides an important axiological indication for assessing cases involving conflicts between one's conscience and the requirements of binding law.

In the cassation appeal, the assumptions regarding the legal protection of individuals who are assigned civilian duties were formulated in a manner that resembles the legal solutions concerning military service, without adequately recognising the significant differences between these two forms of the universal obligation of defence. Contrary to the assertions made in the cassation appeal, neither the European nor the Polish legal systems contain provisions that justify extending legal protection to other cases of conscientious objection beyond those related to military service.

There are, however, compelling reasons to refrain from extending the exceptional regulation in Article 85(3) of the Constitution to other forms of the universal defence obligation. It should be emphasised that the assessment of a specific case of conscientious objection must consider other legally protected values.

In this case, the assessment that the limitations on freedom of conscience and religion resulting from the complainant's obligation to provide civilian duties for defence do not constitute excessive interference with his rights that would necessitate legal protection is warranted. The essence of the right to conscientious objection is not to grant an individual absolute discretion to choose which legal norms to comply with, but rather to permit their refusal to adhere to those norms which they perceive as flagrantly inconsistent with their professed beliefs.

In the circumstances of this case, it is difficult to accept that the complainant's performance of civilian duties – such as reporting immediately to the Port Command for the evacuation of individuals in the event of mobilisation or war – would result in a violation of the core rights derived from the freedom of conscience and religion enshrined in Article 53(1) of the Constitution. Although the complainant experienced a personal conflict between his convictions and the obligations imposed by the contested decision, there are no objective grounds to conclude that this situation threatens his identity or integrity as shaped by conscience and religion.

When resolving this case, it was also necessary to consider that "in a democratic state governed by the rule of law, there is a generally accepted mechanism for balancing conflicting values and opposing considerations that are difficult or even impossible to reconcile. This mechanism is expressed through the principle of proportionality set out in Article 31(3) of the Constitution of the Republic of Poland" (*Konstytucja RP. Komentarz* [Constitution of the Republic of Poland: Commentary], edited by M. Safjan and L. Bosek, vol. I, C.H. Beck, Warsaw 2016, p. 1263).

[I]t must be recalled that one of the purposes set out in Article 31(3) of the Constitution that may justify imposing limitations on the exercise of constitutional freedoms and rights is the necessity to safeguard state security. Similarly, Article 53(5) of the Constitution provides for the possibility of restricting, by statute, the freedom to manifest one's religion when it is necessary to protect state security. There is no doubt that the tasks defined under the Common Defence Act, which are imposed on all organs of state authority, government administration, local government bodies, other institutions and every citizen, primarily serve the purpose of ensuring state security.

The decision issued by the President of the City of Ś., which was reviewed by the Voivodship Administrative Court, was based on Article 203 of the Common Defence Act, which provides that, in peacetime, the mayor or city president issues

administrative decisions that assign civilian duties to individuals, including those planned for execution in the event of mobilisation and war, upon the request of the bodies and organisational units referred to in Article 202(1). This leads to the conclusion that the authorities of both instances adjudicating in the complainant's case did not have legal grounds to grant his request for exemption from the obligation to perform civilian duties, as Article 206a of the Common Defence Act was not applicable to his situation.

In light of the foregoing considerations, and contrary to the cassation allegations, neither norms of international law (such as Article 9 of the ECHR, Article 18 of the ICCPR and Article 10 of the CFR) nor the Constitution provide grounds for questioning the constitutionality of Article 206a of the Common Defence Act on the grounds that it does not account for individuals refusing to perform civilian duties due to conflict with their conscience or religious beliefs. As stated above, the regulations protect the freedom of conscience and religion, but allow for their restriction by statute when necessary, including for the protection of public security.

In the case at hand, there were no grounds to apply protection derived directly from Article 53(1) of the Constitution to safeguard the complainant's rights resulting from freedom of conscience and religion. Regarding the cassation allegations related to Article 53(1) of the Constitution, it is also necessary to reference the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion, whose Article 3(1) states that the exercise of freedom of conscience and religion cannot justify avoiding public duties imposed by law. For individuals with religious or moral convictions, Article 3(2) of the Act allows them to apply for alternative civilian service under the Act of 28 November 2003 on Alternative Civilian Service.

The constitutional and statutory provisions outlined above establish that civilian duties, as a form of the universal defence obligation, are mandatory even for individuals for whom performing such duties conflicts with their conscience and beliefs. The analysis of the specific circumstances of the case, in the context of these constitutional and statutory provisions, did not support the conclusion that there was excessive interference with the complainant's rights related to freedom of conscience and religion, which could render the decisions illegal. Consequently, the Voivodship Administrative Court rightly upheld the decisions issued by the authorities of both instances.

For the reasons stated above, the allegations asserted in point 2 of the cassation basis – regarding the violation of Article 3 § 1 and Article 145 § 1(1)(a) and (c) of the LPAC – through the failure of the Voivodship Administrative Court to fully annul the decisions of the Voivode, as well as the preceding decision of the first-instance [administrative] authority, could not undermine the court's positions.

In the case under review, the absence of a legal provision that would exempt the complainant from the obligation to perform civilian duties due to conscientious objection was decisive. The cassation complaint incorrectly alleged that the complainant's desired legal protection could be derived from the direct application of Article 53(1) of the Constitution or a pro-constitutional interpretation of Article 206a of the Common Defence Act. As established above, such an approach would, in essence, amount to creating legal provisions – a function reserved for the legislature.

It must be noted that analogous positions under similar legal and factual circumstances were adopted by the Supreme Administrative Court in the judgments of 12 March 2020 (case no. II OSK 1259/18) and of 28 September 2022 (case no. III OSK 1402/21).

For all the above reasons, the cassation appeal, being devoid of justified grounds, was dismissed pursuant to Article 184 of the LPAC.

BOOK REVIEWS

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*Maciej Taborowski**

Krystyna Kowalik, Andrzej Jakubowski, Karolina Wierczyńska (eds.), *Harmony and Dissonance in the International Legal Order / Eufonia, harmonia i dysonans w międzynarodowym porządku prawnym / Euphonie, harmonie et dissonance dans l'ordre juridique international. Liber Amicorum Władysław Czapliński,* Wydawnictwo INP PAN, Warszawa: 2024

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INTRODUCTORY REMARKS

The book under review is a commemorative edited volume dedicated to Professor Władysław Czapliński. It has three interesting features. Firstly, it presents specialists in classical international law and European Union law. Secondly, the editors identified the best experts in a given area. Thirdly, the ambition of the authors of individual texts is to showcase topics that are particularly close to them. The texts that make up this publication are of very high quality. The positive assessment of the individual texts, therefore, translates into a high assessment of the book as a whole.

1. EVALUATION OF THE TEXTS IN THE BOOK

The usual convention for such a publication is to arrange the texts in alphabetical order by the authors' surnames. This does not change the fact that four main themes can be distinguished in the publication.

The first group consists of texts on the very foundations of international law. This is the area in which reflection on the nature of international law, its sources, and international responsibility should be situated. Hobe's study on

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the international legal order itself deserves special emphasis ("The International Legal Order: Too Fragile to Be an Attractive Safety Net"). The author shows a number of threats to such an order and considers how they affect the very essence of international law. These threats include blocking the dispute settlement system in the WTO and the wars in the Gaza Strip and Ukraine. Reflections on the essence of international law are also presented by Cała-Wacinkiewicz ("Between Dissonance and Euphony – On the Power of the Unity of the System of International Law in the Context of Its Fragmentation"). An analysis of the latter concept leads her to the conclusion that "the unity of the system of international law is a common ground for the constitutive features conditioning the existence of this system," but "the fragmentation of international law, being an intrasystemic phenomenon, occurs in its detailed part." This aspect is also discussed by Arcari and Bonafe on *jus cogens* ("Divisive Jus Cogens"). The authors pose a number of fundamental questions about the character of *jus cogens*, for example, whether such norms can be created by means of international agreements or whether *jus cogens* can be sought among those regulating the foundations of international relations. The text also refers to methods of ensuring enforcement of respect for *jus cogens* norms. This issue (or rather its broader dimension concerning *erga omnes* norms) appears many times in this work.

Several studies concern the sources of international law. For example, Saganek points out the challenges that unilateral acts of states pose to sources of international law ("Unilateral Acts of States in International Law and the Problem of Sources of International Law"). The book also includes two very valuable texts on the general principles of law (A. Kozłowski, "Identification of the General Principle of International Law" and M. Lugato, "General Principles of Law Recognised by Civilised Nations: The Authority of Pastness in International Law"). Lugato tries to analyze the very essence of general principles, while Kozłowski focuses on the reconstruction of the general principles of international law. He assigns a decisive role in this regard to judges and international courts. He notes that "the suggested model for the reconstruction of a general principle of international law is static in the sense that it refers to a specific constant, i.e., general principles, which are found in every legal order, including international law. It is also a dynamic model, as it takes into account the need to follow the elements of the international legal order that are changing as a result of consensual agreements." This is in line with Kwiecień's considerations on where to look for sources of human rights ("Formal Sources of International Human Rights Law: Treaties, Custom or General Principles of Law?"). The author concludes that "these are the general principles of law and, to some extent, customs are the formal sources of the principles prohibiting

states from violating the fundamental rights of people, including the prohibition of slavery or genocide."

This trend is reflected in the study by Wyrozumska ("The Art of Treaty Interpretation – Green Power v. Spain"). Although it mainly concerns a specific arbitration award, the author formulates several important and noteworthy observations on the interpretation of international agreements. The excellent study by Roth on the importance of the institution of international recognition for international law is also situated in this specific scientific area ("Recognition Doctrine's Unacknowledged Centrality to the International Legal Order").

Three studies deal with the problem of responsibility in a broader sense. Two of them analyze responsibility sensu stricto, i.e., responsibility for violating international law (M. Balcerzak, "International Responsibility of the State and the European Convention on Human Rights: A Few Reflections" and P. Sturma, "Possible Ways to an International Compensation Mechanism"), while the third one addresses liability, i.e., liability for actions not prohibited by international law (M. Seršić, "Liability of States Sine Delicto"). Balcerzak's text as such is a very successful attempt to capture the attitude of the European Convention on Human Rights (ECHR) towards the rules of international responsibility. The author believes that the ECHR "is an international treaty that does not create a closed regime, but belongs to the international legal order." Therefore, he advocates for more frequent inclusion of the articles of the Code of Criminal Procedure in the jurisprudence of the European Court of Human Rights (ECtHR). Sturma examines the issue of responsibility for aggression in an extremely competent way, taking as an example the instrument for estimating the damage caused to Ukraine by Russia, while Seršić, concentrating on the achievements of the International Law Commission, refers to one of the most mysterious institutions of international law, i.e., the need to pay compensation for actions not prohibited by international law.

The second group of contributions consists of studies referring to more specific norms or institutions of international law. Particularly noteworthy are those that deal with the European Union and its law (D. Kornobis-Romanowska, "Euphony in International Law in the Face of the Tumult of Time – The Role of the European Union in the Creation of International Humanitarian Law"; J. Kranz, "Between Superiority, Precedence and the Rule of Law"; and M. Szwarc, "Criminal Law of the European Union – In Search of Harmony"). Another group engages with international criminal law (P. Kovács, "In the Second Place, Where Appropriate... Considerations on the Position of General International Law in the Jurisprudence of the International Criminal Court"). The author very competently presents the impact of general (i.e., other than the

Statute of the ICC) international law on the achievements of the International Criminal Court. A similar subject, although from the perspective of a different court, the International Court of Justice (ICJ), is discussed by Wierczyńska and Zaręba ("Obligations of States in the Context of the Crime of Genocide in the Light of the Jurisprudence of the International Court of Justice"), in which the authors analyze the evolution of the Court's practice in interpreting the Genocide Convention. Other studies relating to the ICJ also deserve attention (P. Grzebyk, "Locus Standi of Third States in the World Court Proceedings Concerning *Erga Omnes* Violations"; P. Hilpold, "The ICJ's Power to Issue Interim Measures According to Article 41 of the ICJ Statute at the Test: South Africa v. Israel before the ICJ" and W. Sadowski, "Against the Tide – A Dissenting Opinion in International Judiciary"). It is worth noting that they refer to the latest trends in the ICJ's jurisprudence on the filing of complaints by states other than those directly aggrieved.

Two chapters are dedicated to the ECtHR (A. Jakubowski, "The Right to Cultural Heritage in the Jurisprudence of the European Court of Human Rights" and B. Łukańko, "The Effectiveness of Interim Measures of the ECtHR in National Law"). They both highlight the impact of the Court on the domestic judicial practice of the States Parties and its role in the implementation of other treaties adopted within the framework of the Council of Europe. Other chapters that fall to this group deal with international economic law (J. Menkes, M. Menkes, "Ban on Trade: From Roman Law to International Law" and C. Mik, "Unilateral Measures of Economic Coercion on Contemporary International Law"), environmental protection law (B. Krzan, "A Different Drum: The UN Security Council and Climate Change"), rules related to the use of force (M. Kowalski, "Neutrality and Its Lost, Double Ratio Legis"; V. Vadapalas, "Emerging Prohibition of the Use of Nuclear Weapons"; and A. Millet Devalle, "La régionalisation du droit du désarmement et de la non-prolifération: fertilisation du droit international des armes?") as well as migration (R. Wieruszewski, "Ius Migrandi – Is It Part of International Law?"). The reviewed work is therefore cross-sectional in nature, presenting valuable views on topics located in various subfields of international law.

The third group of contributions consists of studies referring to specific events in international law or specific documents or rulings. Particularly noteworthy is Balmond's examination on the current crises – including in Ukraine and the Gaza Strip (L. Balmond, "Ukraine, Haut Karabakh, Israël et Gaza: la sécurité collective en question"), a study on EU smart sanctions (K. Kowalik-Bańczyk, "EU Smart Sanctions after February 2024 – An Element of a New Approach") and the resolution "Uniting for Peace" (A. Kleczkowska,

"Resolution 377 "Uniting for Peace": UN General Assembly Powers and the Prohibition of the Use of Force").

The fourth group of contributions consists of studies on Polish-German relations. There are three texts by J. Barcz ("The Contribution of Professor Władysław Czapliński to Research on the Legal Aspects of Polish-German Relations on the So-called Reparation Campaign"), S. Oeter ("Challenged Reciprocity: The German Minority in Poland and the Polish Minority in Germany") and D. Richter ("Polish-German Encounters").

CONCLUSIONS

The book under review deserves to be highly rated. The selection of authors from the best international law scholars results in a very valuable work, attractive to both Polish and foreign readers interested in international law. An additional advantage of the work is a full list of publications of Professor Czapliński.

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Peter Hilpold, Richard Senti, *WTO: System und Funktionsweise der Welthandelsordnung,* 3rd ed., Nomos-Schulthess-Facultas, Baden Baden, Zürich, Wien: 2025, pp. 533

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Richard Senti's textbooks on international trade regulation (first under the General Agreement on Tariffs and Trade (GATT), then within the World Trade Organization (WTO) framework) have for decades set the point of reference for academics, students and practitioners of the German-speaking world and beyond. At the beginning of 2025, readers received the 3rd edition of his most authoritative and comprehensive work "*WTO. System und Funktionsweise der Welthandelsordnung*" (WTO: The system and functioning of the world trade order – all translations from the original German were done by the author of this review). Although it is not common practice to review subsequent editions, sometimes there are compelling reasons to do so – and this is such a case. One reason is that – coming out 25 years after the first edition and 7 years after the second – this is one of, if not the most up-to-date textbook concerning WTO law and operations currently available on the market. Another is that Peter Hilpold (who had already collaborated on the second edition) has been introduced as a co-author in his own right and was actually assigned by Senti to be the successor, assuring the future continuity of this work. The result of this collaboration between a specialist in economic research with particular awareness of the legal dimension and an international law scholar with a special sense for economic issues is the book's unique synergy.

The structure of the book reflects a combination of chronological and problem/subject-orientated approaches. The book is divided into eight parts, starting with an overview of the historical development of the GATT and the WTO (*Part I: From GATT to WTO*). The second part (*The WTO as an institution*) presents the

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constitutional scheme of the WTO as an international organisation, discussing the membership conditions, characteristics of its main organs and the institutional aspects of its functioning, such as the decision-making process and dispute resolution (regarding the latter, there is special reference to the crisis of the dispute settlement mechanism caused by the USA sabotaging the nominations of new members of the Appellate Body).

The third part (*The common contents of the WTO agreements*) deserves particular attention due to its horizontal character (similar to the "institutional" Part II), although it actually deals with substantial provisions. The authors decided to discuss the common features and corresponding regulations of all WTO agreements altogether. Accordingly, problems such as the common goals, the "most favoured" clause, the principles of non-discrimination, reciprocity and transparency, the position of the Global South states or protection of the environment are analysed across the board rather than from an agreement to agreement.

The subsequent parts move to specific agreements within the WTO framework, starting with historically the oldest one: the GATT (*Part IV: The General Agreement on Tariffs and Trade (GATT)*). The fifth part is dedicated to complementary agreements concerning other aspects of trade in goods (*Part V: The GATT supplementary agreements*). It briefly describes the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures (TRIMs), the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing and the Agreement on Trade Facilitation.

Next, the authors deal with the two remaining WTO "pillars", comprehensively presenting the regulations of the GATS (*Part VI: General Agreement on Trade in Services (GATS)*) and the TRIPS Agreement (*Part VII: Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]*). The eighth part deals with the two remaining plurilateral trade agreements in force – the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (GPA) (*Part VIII: The plurilateral agreements*). But this is not the final section.

Actually, Hilpold and Senti's textbook offers more than a mere description of the legal *status quo* of the international organisation on a given date. They lead the reader with complete, systemic analysis through the WTO system, explaining it against the historical and contemporary factual background and with full awareness of the dynamics of the global processes and phenomena influencing it – and of the potential impact on the future. As a result, they provide a sound footing, a point of reference for anyone interested in research and practical issues relating to the WTO. This aim is particularly clearly revealed by the last, conclusive section of the book,

"*Ausblick*" (Outlook), which identifies the vital problems of the WTO's regulation and operation and opens an analytical, critical discourse on the present and future of global trade regulation. Last but not least, its "reference book" character is visible in offering extensive source/reading lists for each part of the book (mainly literature in English and German).

As the authors rightly notice, the political and economic environment significantly changed since the establishment of the WTO. The balance of power has shifted, and pushing individual interests, national or corporate, to the foreground – over the universal, equable, common regulation – has become a major threat to the world trade order. To face the challenges of the future the WTO and the order created within it need to become more value-orientated, adjust fully to sustainable development principles and to reform the dispute settlement system to enhance its effectiveness. Despite all internal shortcomings and external impediments, free trade within the institutional framework of the WTO remains a better governance model than unilateral protectionism.

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*Lukasz Gruszczynski**

Peter Hilpold & Giuseppe Nesi (eds.), *Teaching International Law,* Brill/Nijhoff, Leiden, Boston: 2024, pp. XVIII+ 510

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INTRODUCTION: OPENING THE "HIDDEN ROOM"

In the vast and ever-expanding palace of international law scholarship, there is, as Peter Hilpold describes in his introductory chapter, a "hidden room".[1] It is a space everyone assumes exists, one whose importance is readily acknowledged at law faculties and scientific conferences, yet the door to this room has remained stubbornly difficult to find, let alone open for systematic inspection. At a moment of intense geopolitical tensions, when the very foundations of the post-war international order are questioned and the relevance of international law is debated with renewed vigour in political fora, the question of how we transmit our discipline to the next generation has never been more critical. Editors Peter Hilpold and Giuseppe Nesi have entered into this timely and vital conversation with their collection, entitled *Teaching International Law*. This is no mere assortment of reflections; it is a carefully curated, comprehensive and deeply thoughtful examination of the current state of affairs. I believe that the editors have not only found the key to the hidden room, but have thrown its doors wide open, inviting the global community of international lawyers to a necessary dialogue about the art, science and politics of their craft.[2]

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[1] P. Hilpold, *Teaching International Law in the 21st Century. Opening the Hidden Room in the Palace of International Law*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, p. 21.

[2] Note that another book on the same topic was published almost simultaneously: J.-P. Gauci, B. Sander (eds.), *Teaching International Law Reflections on Pedagogical Practice in Context*, Routledge, New York: 2024.

The volume assembles a veritable "who's who" of contemporary international law to reflect on the challenges and opportunities of teaching it in the 21st century. The result is a work of great value, not only for scholars but also for anyone interested in relevance of the international legal order. It is a landmark contribution that succeeds on multiple levels: as a practical guide filled with innovative ideas, as a theoretical exploration of the discipline's identity and as a sociological snapshot of the "invisible college" reflecting upon itself.

1. THEMATIC COHESION: CHARTING THE MODERN PEDAGOGICAL LANDSCAPE

Across its many contributions, several recurring themes emerge, providing a coherent narrative that paints a rich, complex portrait of the contemporary state of teaching international law (TIL). These themes provide the intellectual frames of the book, allowing it to function as a unified whole rather than a disparate collection of essays.

A central tension, articulated by several authors, is the evolving and often contested role of the international law teacher. The traditional image of the teacher as a high priest of a sacred legal text, a direct descendant of Grotius or Vattel, has given way to a more fraught identity. Today's teacher, as Hilpold notes, may be seen as anything from a "saint" or "prophet" to a "miserable apologist" or an "entrapped tin soldier bowing to bureaucratic edict".[3] This spectrum reflects the precarious position of international law itself, caught between its universalist aspirations and the raw realities of state power. Therefore, it is better to see the teacher not as a mere transmitter of settled doctrine, but rather a navigator of a complex field, tasked with equipping students with knowledge that will allow them to understand a system that is simultaneously a tool for justice and an instrument of power.

This leads to a second critical theme: the dynamic interplay between theory and practice. The book skilfully navigates this long-standing debate on whether TIL should prioritise doctrinal knowledge or practical skills. The contributions collectively argue for a combination of the two. Pierre-Marie Dupuy, with his extensive experience before international courts, cautions against excessive dogmatism, noting that the law must be understood "as it is in force and actually practiced."[4] Conversely, he underscores the indispensability of a solid grounding in the theory to understand international law as a coherent legal order rather than a "junk shop" of disparate norms.[5] Giuseppe Nesi's personal reflection on his career as a "diplomat-jurist" pro-

[3] Hilpold, *supra* note 1, pp. 3, 24 and 71.

[4] P.-M. Dupuy, *Is There an Art of Teaching International Law?*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, p. 188.

[5] *Ibidem*, p. 186.

vides a compelling case for this synergy. He argues that practical experience enriches teaching by lending credibility, overcoming cynicism and providing a "greater depth of knowledge" that benefits both the classroom and the chancellery. The volume makes it clear that the most effective pedagogy lies not in choosing one over the other, but in finding a productive and mutually reinforcing balance.

A third theme (and perhaps the most urgent one) concerns the institutional environment in which teaching takes place. Several chapters sound a powerful alarm about the threats to academic freedom and the integrity of legal education. Gerd Morgenthaler identifies the rise of a technocratic "new Managerialism"[6] as a profound danger, one that seeks to impose business-style governance models on universities, potentially stifling the "pure and independent thinking" that is the lifeblood of academia. Carlo Focarelli echoes this concern with his critique of "supermarketized universities" and the "commodification of knowledge".[7] He argues that the relentless push towards measurable "output" and marketable skills risks producing "generations of useful machines, rather than complete citizens who can think for themselves".[8] This critique is vital, as it reminds us that the purpose of TIL extends beyond preparing students for a career; it is about cultivating citizens capable of navigating a complex global reality with wisdom, responsibility and a deep-seated commitment to justice.

Finally, the book grapples with the tension between the universal and the particular. While international law claims universality, its teaching is a deeply local practice. This tension manifests in debates over curriculum design: should we strive for a universal canon, or should teaching be grounded in national and regional contexts? Jan Wouters makes a compelling case for a "European perspective", not as an exercise in Eurocentrism, but as a necessary reflection of the multi-layered legal reality of the continent.[9] Andreas Ziegler argues for teaching international law as the "law of the land", emphasising the domestic nexus to make the subject more concrete and relevant for students.[10] This move towards localisation is, as Lucas Lixinski observes in his survey of the literature, a major trend that pushes back against the grand, often Eurocentric, universalist projects of the past.[11]

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[6] G. Morgenthaler, *Teaching International Law in Germany*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, p. 344.

[7] C. Focarelli, *Teaching International Law Today and the Human Person*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, pp. 132 and 149.

[8] *Ibidem*, p. 125.

[9] J. Wouters, *Teaching International Law from a European Perspective*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, pp. 211 et seq.

[10] A. Ziegler, *Teaching International Law as "Law of the Land"*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, pp. 303 et seq.

[11] L. Lixinski, *Scholarship on the Teaching of International Law*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill/Nijhoff, Leiden, Boston: 2024, pp. 435 et seq.

2. A TOUR OF THE CONTRIBUTIONS: FROM GLOBAL VISIONS TO PRACTICAL TOOLS

While thematically coherent, the strength of this book lies in the specificity and depth of its individual chapters. The editors have organised them logically, allowing the reader to build a comprehensive understanding of the field.

Part II, entitled "Global Perspective" (and which comes immediately after the Introduction), starts with Hilpold's chapter ("Teaching International Law in the 21st Century"), which provides a detailed overview and situates the contemporary teacher within a historical and institutional context. Charlotte Ku ("U.S. Approaches to Teaching International Law in a Global Environment") offers a pragmatic and insightful analysis of the US approach, highlighting the constraints of a curriculum geared towards the bar exam and immediate employment, but also arguing persuasively that an international-law mindset is increasingly essential for all legal fields, especially in the wake of global crises like the COVID-19 pandemic. Carlo Focarelli's contribution ("Teaching International Law Today and the Human Person") challenges us to consider what "teaching" is ultimately for and provides a powerful defence of a humanistic pedagogy. This is followed by concise yet insightful reflections from Natalino Ronzitti ("What Is a Good International Law Teacher?") on the essential qualities of a good teacher, whom he argues must possess deep doctrinal knowledge, practical experience and, above all, "independence". Pierre-Marie Dupuy ("Is There an Art of Teaching International Law?") writes on the "art" of teaching, warning us against doctrinal fads and stressing the importance of confronting theories with their practical effectiveness. Giuseppe Nesi's personal account of being a "diplomat-jurist" provides a compelling narrative anchor for the theoretical reflections included in this part ("Teaching International Law").

Part III delves into national, regional and methodological perspectives, showcasing the rich diversity of TIL. Jan Wouters makes a strong case for teaching from a "European perspective", demonstrating how the European Union and the Council of Europe have created a unique multi-layered legal order that fundamentally shapes the practice of international law on the continent ("Teaching International Law from a European Perspective"). Barbara Marchetti's lucid introduction to Global Administrative Law and Sergio Dellavalle's exploration of interdisciplinarity and the "paradigms of order" demonstrate the book's engagement with cutting-edge theoretical developments that are reshaping our understanding of global governance. Andreas R. Ziegler's practical and pointed recommendations – such as making public international law a compulsory subject early in the curriculum – serve as a necessary corrective to programmes that marginalise this subject ("Teaching International Law as 'Law of the Land'"). The inclusion of a multi-authored section

on the specific challenges of TIL in Germany, featuring Rüdiger Wolfrum, Heribert Hirte and Gerd Morgenthaler, provides a fascinating and detailed case study ("Teaching International Law in Germany"). It reveals a system where international law's constitutional importance is not fully reflected in a legal education system heavily orientated towards the *Staatsexamen* and the needs of the domestic judiciary, a situation that many readers from other jurisdictions will find strikingly familiar.

The volume then turns in Part IV to the teaching of specific sub-disciplines, an acknowledgment of the field's increasing specialisation. Ernst-Ulrich Petersmann's chapter on international economic law is a tour de force, advocating for a value-orientated approach grounded in human rights, theories of justice and the Sustainable Development Goals. He challenges teachers and students to move beyond narrow, formalistic analyses and to engage with the profound ethical and political questions at the heart of the global economy. Nikos Lavranos complements this with a call for a "true holistic approach" to teaching international investment law, warning against the dangers of "clinical isolation" and stressing its deep connections to constitutional law, EU law and the broader rule of law.

Perhaps the most forward-looking section is Part V, which examines the tools, instruments and resources available to the modern teacher. The chapter by Markus Beham, Melanie Fink and Ralph Janik, called "Visualising International Law", is a creative and practical guide to using movies, images and cultural references to make abstract concepts tangible and engaging. It is a welcome reminder that pedagogy can and should be innovative. James Summers' candid reflection on the travails and triumphs of "Writing an International Law Textbook" offers a rare and valuable behind-the-scenes look at a process central to our discipline's pedagogy, exploring the delicate balance between authority, clarity and market constraints. Finally, Pierre d'Argent's chapter, "Teaching International Law Massively", is an inspiring account of how technology can be harnessed through massive open online courses (MOOCs) to realise Elihu Root's century-old call for a broader "popular understanding of international law".

The final substantive part of the book, Part VI, turns the perspective of scholarship back onto itself. Lucas Lixinski's "Overview of the State of the Art" is an indispensable contribution, a meta-analysis that maps the trends and preoccupations of the very literature to which this volume belongs. His observation that much of the writing on TIL remains self-reflective and only pays lip service to genuine interdisciplinary engagement with pedagogy is a crucial challenge for future research. The book fittingly concludes this section with Bartłomiej Krzan's insightful tribute to Manfred Lachs and his seminal work, *The Teacher in International Law*. This chapter serves as a powerful bridge, connecting the contemporary debates within

the volume to the intellectual legacy of one of the 20th century's most dedicated teachers.

3. THE OVERALL ASSESSMENT AND CONCLUDING THOUGHTS

Teaching International Law is an outstanding and deeply satisfying scholarly achievement. Its primary strength lies in its remarkable synthesis of breadth and depth. The editors have curated a collection that is at once theoretically ambitious and intensely practical, globally minded yet attentive to local specificities. The sheer quality of the contributors ensures that each chapter is a thoughtful, well-argued and often provocative piece of scholarship in its own right. The book successfully avoids the common pitfall of edited volumes – a lack of coherence – by virtue of the clear thematic threads that run through its diverse contributions. It is a work that can be read from cover to cover as a sustained conversation, or dipped into for specific insights on particular topics.

If there is a constructive criticism to be made, it is one that Lixinski's chapter anticipates and that is inherent in a project of this nature. While the volume boasts a section on the "Global Perspective" and features authors with extensive international experience, its intellectual centre of gravity remains discernibly European and North American. The detailed case study of Germany is a significant strength, but one is left wondering about the pedagogical landscapes in major legal cultures in Asia, Africa and Latin America. This is not so much a critique of the present volume as it is an observation of the current state of the scholarly conversation and an invitation for future work. The editors themselves acknowledge in the prologue their hope for "extended future editions". One hopes that such future endeavours will build on this excellent foundation to incorporate even more perspectives from scholars and practitioners in the Global South, further enriching the dialogue and moving closer to a truly global understanding of TIL.

In conclusion, *Teaching International Law* is more than just a book about pedagogy; it is a reflection on the identity and future of international law itself. It serves as an indispensable resource for professors and junior scholars alike, offering a wealth of practical ideas, theoretical frameworks and, most importantly, a renewed sense of purpose. It reminds us that teaching is not a secondary activity to be squeezed in between research projects, but a central, formative practice through which the international legal order is constantly being reproduced, contested and reimagined.

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Alberta Fabbricotti (ed.), *Intentional Destruction of Cultural Heritage and the Law: A Research Companion,* Routledge, London–New York: 2024, pp. xxv + 451

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On 21 July 356 BCE, an individual of obscure origins, known as Herostratus, deliberately set fire to the sacred Temple of Artemis in Ephesus. As a result, this monumental structure, revered as one of the Seven Wonders of the Ancient World, was reduced to rubble within hours. Upon his arrest and subsequent interrogation, Herostratus openly admitted to the act, disclosing that his primary motivation was the pursuit of notoriety. He was seeking *kleos* – glory – for having destroyed the sacred Temple of Artemis. Herostratus was executed for his sacrilege and his motives were deemed exceptionally disgraceful. Consequently, he was not only sentenced to death, but also prevented from fulfilling his aspiration for eternal glory. To ensure that Herostratus never achieved his professed goal of everlasting fame, he was sentenced to *damnatio memoriae*. His name and memory were condemned to eternal oblivion. It was henceforth forbidden to even mention the name of Herostratus.[1]

However, this punishment was not executed with complete effectiveness, as the name of the arsonist remains known today. In contemporary usage, "herostratic" has come to describe individuals who commit heinous crimes in pursuit of notoriety. Particularly in the post-9/11 world, Herostratus has emerged as a prototype for terrorists seeking to shock the global public. While their primary targets are often innocent civilians, some also direct their attacks toward renowned monuments and cultural landmarks. A notable parallel can be drawn between the arson of the Temple of Artemis and the Taliban's destruction of the Bamiyan Buddhas in Afghanistan

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[1] M. Fraser, *Monumental Fury: The History of Iconoclasm and the Future of Our Past*, Rowman & Littlefield, Lanham: 2022, p. 35; K. Wierczyńska, A. Jakubowski, *Al Mahdi Case: From Punishing to Repairing Cultural Heritage Harm*, in: A.-M. Carstens, E. Varner (eds.), *Intersections in International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 133.

more than two millennia later.[2] Even more concerning is that, over the past two decades, the world has witnessed further disgraceful acts of destruction targeting cultural property and monuments of international significance, which constitute the shared heritage of humanity. Examples of the destruction and looting of secular and religious heritage sites of historical and artistic significance, resulting in severe damage and irreparable losses, have been provided by the internal conflicts in Mali, Iraq, Syria, and Yemen.[3] One of the most egregious violations of international law on the protection of cultural property was the destruction of Palmyra, a UNESCO World Heritage site often referred to as the "Venice of the Sands," which had a history spanning four millennia.[4] While the primary motivation behind such actions by non-state armed groups may no longer be the pursuit of fame and notoriety; numerous other reasons – equally senseless, barbaric, and reprehensible – drive these groups to destroy or loot cultural heritage in the territories they control. The use of explosives, artillery shelling, demolition, and desecration of cultural heritage sites can, for instance, serve as components of "cultural cleansing", deliberately planned and executed by fundamentalist organizations.[5]

However, the intentional targeting and destruction of cultural property are not currently the exclusive purview of non-state armed groups. Conducting its "special military operation", which was nothing more than an unprovoked invasion, Russia has systematically leveraged cultural heritage as a tool in its military operations against Ukraine, in direct contravention of international law. It simultaneously employs culture as a misleading justification for its aggression while deliberately targeting it as an object of warfare. By instrumentalizing historical and cultural narratives to advance its geopolitical objectives, Russia has engaged in the exploitation of cultural heritage. Central to the Kremlin's rhetoric are fabricated claims portraying Ukrainians and Russians as a single people and Ukraine as a fictitious state, which serve as key justifications for its full-scale invasion. As a result, Ukrainian cultural heritage, which embodies and preserves the nation's identity, has become a direct target of these hostilities.[6]

The authors of the book under review, who include experts in not only the legal aspects of protecting and respecting cultural heritage, but also in related legal dis-

[2] *Ibidem*, pp. 37–38.

[3] *See* R. O'Keefe, *The Application of the Second Protocol to Non-International Armed Conflicts*, in: *Protecting Cultural Property: International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, 25–26 April 2019 Geneva, Switzerland – Conference Proceedings*, UNESCO, Paris: 2020, p. 41.

[4] *See* S. Casey-Maslen, S. Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict*, Hart Publishing, Oxford-Portland: 2018, p. 124.

[5] M. Lostal, *International Cultural Heritage Law in Armed Conflict: Case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge: 2017, p. 2.

[6] NATO Parliamentary Assembly, Committee on Democracy and Security, *History and Identity under*

ciplines, fully comprehend the gravity of such threats and the tragic consequences of destructive actions targeting cultural property. The composition of the authorial team is, in fact, one of the book's greatest strengths – not merely due to the impressive number of contributors (30 in total), but primarily because it includes scholars from academic circles, legal practitioners, former or current representatives and collaborators of international and national organizations, and institutions dedicated to the promotion and protection of cultural heritage. The volume is edited by Alberta Fabbricotti, an Associate Professor of International Law at the Department of Legal and Economic Studies (Faculty of Law, La Sapienza University in Rome), who has extensive experience in inter-university research projects as well as international academic and educational collaboration. This carefully selected and highly qualified team, under the guidance of an experienced editor, has resulted in a publication of substantial scholarly merit, offering rigorous and well-founded analysis of the issues it addresses.

Engaging with the subject matter of this publication was undoubtedly a challenging endeavor, as the answers to the research questions were neither simple nor self-evident. The authors' primary objective was to present and analyze the remedies available under contemporary international law to prevent and sanction acts of "intentional destruction of cultural heritage of humankind" (IDCHH). Indeed, the book examines the range of legal remedies provided by both customary law and specialized responsibility regimes across various domains of international law to address this unlawful activity. It analyzes UNESCO instruments, UN measures for maintaining international peace, human rights protection mechanisms, investment protection frameworks, and decisions of the International Criminal Court. The study explores legal avenues such as international court appeals, peacekeeping operations, referrals to national criminal legislation, and reparations as potential responses to such violations. A key concept within this legal analysis is the term "intentional destruction of cultural heritage of humankind", which directly references the closely related – and arguably the most comprehensive – definition found in the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage.[7] While this definition serves as a foundational reference, the authors

Attack: Protecting Cultural Heritage in Conflict, Special Report of Special Rapporteur Julie Dzerowicz, 047 CDS 24 E rev.1 fin, Brussels: 2024, p. 6.

[7] *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage*, UNESCO, Paris, 17 October 2003, available at: https://international-review.icrc.org/sites/default/files/irrc_854_unesco_eng.pdf (accessed 30 June 2025). According to Art. II-2 of the Declaration, IDCHH means "an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law."

do not apply it statically or without critique. Instead, they engage in a dynamic and interpretative analysis, exploring its elements in a nuanced, constructive way. Admittedly, in the technical framework of international law, IDCHH applies to a relatively narrow set of circumstances that constitute prohibited conduct. However, as demonstrated in the book, international law – through its various branches and enforcement mechanisms – recognizes and condemns IDCHH from multiple perspectives. Furthermore, the concept of "Cultural Heritage of Humankind" implies that such destruction affects not only the state or community where the cultural property is located, but also all states, peoples, and human groups worldwide. Therefore, the book explores the international legal remedies available to entities that are not directly harmed by IDCHH but seek to end it and receive reparation.

The reference to "law" in the book's title appears to be a broad thematic framing; however, it actually pertains to international law, or at least that is the predominant area of law. This does not alter the fact that the scope of the reviewed publication is extensive, as reflected in its detailed structure, which is divided into parts, sections, and chapters. The substantive justification for such a complex structure lies in both the complexity of the subject matter and the diverse approaches and processes through which each relevant area of international law responds to IDCHH by establishing remedies and countermeasures. There is also another, more pragmatic (though entirely understandable) reason for this structure: the chapters comprising the work are largely the proceedings of the conference "The Intentional Destruction of the Cultural Heritage of Humankind: What Are the Remedies Under International Law?" – held at the University La Sapienza in Rome in December 2021. Multi-author works, which are the result of academic conferences and serve as a distinct summary of the discussions held during them, are necessarily multi-faceted and diverse. However, there is always a core that unites seemingly disparate topics, a binding element that connects the chapters into a cohesive whole. In this book, this core is undoubtedly its focus on specific remedies to IDCHH, within the framework of often disparate fields of international law, which vary in terms of content, enforcement mechanisms, and even underlying principles. Concentrating on the remedies for IDCHH provided by international law rather than simply offering an analytical review of international instruments that outline the prohibition against it is also a distinguishing feature of this publication in comparison to other works in this research area. It should therefore be emphasized that, although in recent years there has been an increasing number of monographs dedicated to cultural heritage, including aspects related to its intentional destruction,[8] the volume under

[8] Among recently published works, particular mention should be made of J.A. Gonzáles Zarandona, E. Cunliffe, M. Saldin (eds.), *The Routledge Handbook of Heritage Destruction*, Routledge, London: 2024. However, this publication differs in nature from the monograph being reviewed, as its underlying assumptions and objectives are distinct: it offers a comprehensive analysis of the destruction of art and heritage by

review aims to offer a novel perspective on the current state of the art in the debate surrounding IDCHH.

As the editor of the publication notes, from a methodological perspective, the issues addressed in the volume can be divided, firstly, according to two legal regimes governing responsibility for IDCHH – State responsibility (Parts 1 and 2) and individual criminal responsibility (Part 4). Importantly, these two regimes are not mutually exclusive, as a single case may involve both state and individual responsibility.[9] Furthermore, there are numerous areas of overlap between the two, particularly in relation to IDCHH, especially when states are required to criminalize IDCHH within their domestic legal systems. Part 3 reflects this hybrid nature, as both states and individuals can be responsible for committing IDCHH. Secondly, all chapters of the volume are organized by the scope of the legal systems under consideration, starting with universal systems (e.g. the UN) and moving on to more specialized ones. The discussion focuses on remedies for IDCHH within the UN and UNESCO frameworks, the jurisprudence of the International Criminal Court (ICC), and specialized regimes such as human rights protection and ad hoc international criminal courts. This comparative analysis highlights a range of intersecting and complementary solutions for addressing IDCHH.

The introductory chapter by Alberta Fabbricotti exists somewhat outside the main structure of the book. It clarifies the objectives and premises of the book, outlines its content and methodological foundations, and, most importantly, establishes the conceptual framework and core definitions (such as "intentional destruction" or "remedy") which underpin all the discussion and analysis. Additionally, it precisely defines the content and scope of IDCHH. This chapter is of crucial importance for understanding the inherently complex content of the book. It serves as an essential starting point for readers, providing clarity on the book's subject matter and guiding the interpretation of these key "remedies" within the context of the international law regimes. Structurally, this chapter integrates the various parts of the volume, transforming them into a coherent and logical legal discourse. Together with the final chapter (also authored by Fabbricotti), it forms a conceptual paradigm that unifies the multifaceted discussions and reflections around a common central issue.

synthesizing theoretical and legal frameworks with diverse conceptual perspectives and a broad scope of case studies. It also examines the underlying factors driving heritage destruction and critically assesses its various manifestations across different contexts and circumstances.

[9] *See* Art. 25.4 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." *See also* Art. 38 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172: "No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation."

The first part of the book, dedicated to actions against IDCHH within the UN system, begins with Section 1, which focuses on the achievements and shortcomings of UNESCO. This section seeks to identify the mechanisms available to the organization for addressing and mitigating IDCHH attacks, while consistently considering its fundamental structure and constrained capacity to impose coercive measures in order to ensure compliance with its regulations. Patrizia Vigni explores the possibility of applying the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) to establish state responsibility arising from IDCHH, due to the absence of other international norms specifically regulating the issue. In particular, the UNESCO conventions on cultural heritage do not explicitly prohibit intentional destruction, making it crucial to define existing obligations regarding IDCHH in order to establish state responsibility. This, in turn, enables ARSIWA to be applied and the responsible party identified. The author concludes that innovative procedural rules are needed to address serious breaches like IDCHH, as the UN Security Council's efforts under Chapter VII have been largely ineffective. Given the rising occurrence of IDCHH, urgent regulatory measures are required to prevent further violations.

The next chapter in this section, authored by Lorenzo De Poli and Alberta Fabbricotti, focuses on the effectiveness of sanctioning war crimes regulated under the 1954 Hague Convention and its Second Protocol, as examined through the lens of national legislation. The authors begin with the assumption that the Hague Convention has struggled with effectiveness, as conflicts in the former Yugoslavia and Syria, for example, have shown that many states fail to enforce their obligations. Then they analyze Art. 28 of the Convention, highlighting its weaknesses, and examine its implementation in national law. The Second Protocol, which expands the Convention by listing offenses against cultural property, is then discussed; finally, the domestic legislation of selected states is reviewed. Particular attention is paid to Italy's legislation – the authors argue that the case of Italy demonstrates that the implementation of the Second Protocol has resulted in significant advancements, both in enhancing the effectiveness of protection and in improving the national penal system.

The subsequent chapter in this section presents a highly detailed and critical analysis of the 2003 UNESCO Declaration, conducted by Federico Lenzerini and Angela Federico. Indeed, the chapter highlights both the strengths and weaknesses of the Declaration, with appropriate references to its subsequent practical application, not only within the UN. The critical reflections regarding the document's shortcomings and its rather marginal significance in practice are particularly valuable. Notably, one of the chapter's authors, Lenzerini, was a member of the Italian

delegation during the Declaration's negotiations. His insights, therefore, are based on personal experience and long-term observations.[10]

Section 1 concludes with two chapters on a similar topic, both addressing the practical dimension of UNESCO's cooperation with member states in deploying national task forces to areas affected by IDCHH incidents. Specifically, they examine the 2016 Italian/UNESCO Unite4Heritage Task Force initiative, which has garnered interest due to its innovative approach. Costanza Rizzetto analyzes the operational framework, mandate, and past experiences of the aforementioned Italian task force, with a particular focus on its effectiveness, and concludes that this unit appears to face certain limitations in effectively ensuring the protection of cultural heritage. The chapter by Jessica Wiseman and Raghavi Viswanath addresses certain changes from 2022 concerning the functioning of such task forces and analyzes the implications of these changes. As a result, the authors propose that the "activated taskforce" should not be viewed as an isolated initiative, but rather as a significant milestone in a proactive, coordinated effort within UNESCO, supported by key member states (particularly Italy). This initiative aims to enhance regulatory authority and position the organization as a central international law player.

Section 2 of the first part addresses actions taken within the UN system, which, in the context of remedies for IDCHH, may appear less evident than the activities of UNESCO. However, the three chapters in this section demonstrate that this is a mistaken impression. When analyzing the United Nations Security Council (UNSC) resolutions that reference IDCHH, Kristin Hausler operates on the premise that IDCHH not only constitutes a violation of international humanitarian law or international human rights law, but also poses a threat to peace and security. This notion was, in fact, affirmed in Resolution 2347 (2017), in which the UNSC made clear that the destruction of cultural heritage was, in itself, a threat to international peace and security and that its protection was a security and humanitarian imperative.[11] The author examined not only the aforementioned resolution, but also earlier UNSC resolutions related to cultural heritage in order to determine whether they impose obligations on states (as well as other entities) to respect and protect cultural heritage. This analysis enabled the author to identify several critical gaps arising from both the member states' approaches toward heritage destruction and the inherent limitations of the Security Council.

In the next chapter, Laura Pineschi argues that integrating cultural heritage protection into the mandate of peacekeeping operations (PKOs) appears justified,

[10] *See also* F. Lenzerini, *The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, 13 Italian Yearbook of International Law 131 (2003).

[11] *See* UN Security Council Resolution 2347 (2017), 24 March 2017, S/RES/2347 (2017) Preamble. A more detailed discussion of this resolution can be found in A. Jakubowski, *Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level*, 48 Questions of International Law Zoom-in 21 (2018).

given their well-documented "flexibility" and the operational methods developed over the years. The lack of a stringent legal framework has enabled the UN to utilize a mechanism that can be readily adapted to the specific demands of various crises across different regions. However, as the author rightly observes, it is questionable to assign additional responsibility to missions that are already overburdened, understaffed, under-resourced, and entrusted with functions and powers that often prove difficult to reconcile with the structural limitations of a UN PKO. Thus, if PKOs are to be utilized for the protection of cultural heritage, they must be supported by a clearly defined mandate, a realistic capacity for implementation, adequate resources (including properly equipped UN forces), a tailored strategy, and specific operational mechanisms.

In the final chapter of Section 2, Erkan Akdogan focuses on the UNSC's so-called targeted sanctions against individuals as an effective remedy to IDCHH. Considering the UNSC's past experience with the application of targeted sanction mechanisms, equipped, among other things, with sanctions committees and obligations for states to cooperate with them, it seems that this method of combating IDCHH perpetrators has a high potential for success.[12] Therefore, the author analyzed the functioning of these mechanisms in practice, paying particular attention to specific examples of sanctions monitored by the Mali Sanctions Committee (established pursuant to Resolution 2374 of 2017), which allowed him to highlight several conceptual, structural, and institutional advantages and drawbacks and to formulate interesting and, to some extent, critical conclusions.

Part 2 of the book examines the remedies to IDCHH that emerge from the application of international human rights standards. In this context, IDCHH is recognized as a violation of individual rights and values associated with the right to participate in cultural life. The central idea of this part is to present IDCHH as a violation of the rights of individuals and ethno-cultural communities, which necessitated the clarification and analysis of complex legal issues. It is therefore appropriate that this section opens with a chapter by Federico Lenzerini on the character of the rights infringed by IDCHH. In particular, the author reflects on whether the rights violated as a result of IDCHH are individual, collective, or group-based in nature. Interestingly, the author approaches the solution to this issue from the perspectives of five different entities whose rights are affected by IDCHH: the international community as a whole; the peoples of regional organizations; states and national peoples; ethnic, racial, minority, linguistic, or religious communities or groups; and individuals. The author does so in order to systematically discuss – for each of these entities – the reasons why they are affected by IDCHH, the main

[12] For a more comprehensive discussion on UN targeted sanctions, *see e.g.* F. Giumelli, *Understanding United Nations Targeted Sanctions: An Empirical Analysis*, 91(6) International Affairs 1351 (2015).

implications arising from it, and the ways through which they can obtain reparations for the wrongs they suffer.

Considering cultural heritage to be a category of human rights, Leila A. Amineddoleh and Claudia S. Quiñones Vilá seek to determine the legal protection mechanisms available for cultural heritage within this framework. They assume a particular intersection between international and national (or supranational) mechanisms for the protection of cultural heritage and its associated rights, which is essential not only for the development of targeted legal frameworks, but also for their effective enforcement. To achieve this objective, the authors conduct a detailed analysis of both relevant international legal instruments and national regulations, enriching their discussion with carefully selected (including contemporary) examples of destruction tied to looting and claims for restitution. Confirming that cultural heritage has already attained a privileged status and is widely regarded within the human rights framework, the authors emphasize the necessity of properly utilizing existing tools to more effectively address the current challenges.

The subjective dimension of considerations regarding remedies to IDCHH is addressed by Ann Marie Thake, who seeks to answer the question of who qualifies as a "victim" of IDCHH and what rights they have to submit a claim. The author refers to the reparations order of the ICC in the *Al Mahdi* case,[13] in which the Court identified four distinct victims: individuals, the community directly affected by the destruction, the State of Mali, and the international community. She then proceeds to examine whether the four categories of victims identified by the ICC, particularly the international community, qualify as entities entitled to seek redress under human rights law, given that the deliberate destruction of cultural heritage is recognized as a violation of human rights. The study examines three regional human rights systems (the European, Inter-American, and African systems), and while it encompasses all types of victims identified by the ICC, its primary objective is to determine whether the international community can collectively meet the admissibility criteria applied by these regional courts.

In the final chapter of Part 2, Leonard Hammer examines forms of redress and avenues for enforcing the judgments of human rights courts. He primarily focuses on regional systems of human rights protection, arguing that regional forms of redress for the protection of indigenous peoples' cultural heritage largely stem from the frameworks of protection granted to indigenous peoples and their rights, particularly within the Inter-American and African systems. His observations and conclusions are rather ambivalent: on the one hand, regional systems provide redress for indigenous peoples and the possibility of criminal action against those

[13] *See* ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi* ICC-01/12–01/15–236, Reparations Order, 17 August 2017.

responsible for destroying cultural heritage during conflicts; on the other hand, the overall system of protection and redress for cultural heritage protection remains state-centric and limited, and peacetime protection methods are ineffective, without effective enforcement mechanisms, and dependent on bureaucratic processes. The author is convinced, however, that the use of international processes and the involvement of various actors in cultural heritage protection can strengthen the methods of norm enforcement.

Part 3 of the volume examines the emerging intersection between IDCHH and international investment law (IIL), a field traditionally focused on economic interests. However, given the evolving legal consequences of investor activities that may contribute to IDCHH, this area presents significant potential for further development. The authors of the four chapters comprising Part 3 explore this still uncharted research area, with each chapter presenting a slightly different approach to the subject. Ludovica Chiussi Curzi and Niccolò Lanzoni underscore that cultural heritage may be impacted by economic activities in various ways, including through illicit trade, anthropogenic disasters, unregulated urbanization, resource extraction, and land appropriation. It is therefore essential to define the interaction between IIL and cultural heritage law, examining the obligations of states in both areas and assessing the extent to which obligations may also be imposed on investors. The chapter also references relevant practice by providing examples of cultural issues in investment disputes. In doing so, the authors seek to address the questions of whether, and to what extent, investors' obligations are emerging or should begin to emerge under IIL, as well as the potential role of "cultural heritage due diligence" in accelerating this process.

In the following chapter, Valentina Vadi examines various forms of iconoclasm, with particular emphasis on "economic iconoclasm," which refers to the destruction of cultural heritage sites to promote economic development. She then explores how IIL can prevent, respond to, and mitigate the effects of the IDCHH. By doing so, the author seeks to bridge an existing gap in the legal literature and contribute to the ongoing debate by mapping the complex and multifaceted response of IIL to the deliberate destruction of cultural heritage, as well as analyzing the role that IIL – particularly arbitration – can play in protecting it. In conclusion, the author asserts that, despite the extraordinary resilience of cultural heritage, there is a pressing need to develop a holistic approach toward protecting it, one that considers both cultural preservation and economic development.

In the chapter authored by Victor Stoica, the primary issue under analysis is compensation for alleged IDCHH in the context of decisions rendered by investment arbitration tribunals. The author rightly observes that in certain cases involving cultural heritage, the calculation of compensation warrants special attention due

to the global significance of sites listed on internationally protected registers, such as the World Heritage List. The chapter begins with a discussion of compensation in public international law litigation and investment arbitration, as well as its links to restitution in kind. These theoretical considerations are supplemented with carefully selected examples of remedies before investment tribunals in cases concerning cultural heritage. This approach enables the author to subsequently focus on the impact that the intersection and interaction of public and private interests exert on the application of compensation mechanisms in investment disputes involving cultural heritage.

A final chapter in this part, written by Edward Guntrip, illustrates a study case – the Juukan Gorge caves. In May 2020, the mining company Rio Tinto – in adherence to domestic legislation – destroyed indigenous cultural heritage associated with the Juukan Gorge caves in Western Australia, as part of its iron ore mining activities. As the author observed, given the legal permissibility of Rio Tinto's actions, Australia's domestic legal framework does not offer any remedies for the loss of this cultural heritage. Assuming that international law protects sites of cultural significance to humanity by prohibiting IDCHH, the author uses the Juukan Gorge caves as a case study to examine the remedies available under international law when this prohibition is violated by a corporation – ultimately reaching valuable, yet somewhat unsettling conclusions.

Part 4 of the book examines the international responsibility of individuals and explores the field of international criminal law (ICL), an area that has seen significant developments in relation to IDCHH and the legal remedies available for it. The first two chapters of this part provide a general framework for understanding IDCHH as a crime. Francesca Sironi De Gregorio analyzes IDCHH as a war crime, understandably limiting the scope of her research to the criminalization of IDCHH under ICL during armed conflict (both international and non-international), thereby drawing on the definition of cultural property as established in the 1954 Hague Convention. To this end, the author reconstructs the legal framework governing IDCHH in times of armed conflict, taking into account both customary law norms that criminalize such acts in wartime and the most relevant provisions of international humanitarian law. The chapter also examines the case law of international criminal tribunals on this matter, aiming to highlight the similarities and differences in the approaches adopted by various institutions and to identify potential directions for further development in the field. In turn, Kerstin von der Decken and Pablo Gavira Díaz examine IDCHH as a crime against humanity, arguing that the scope of Art. 7(1)(h) of the ICC Statute may allow for prosecuting IDCHH as a crime against humanity in the form of persecution. By analyzing both the statutes and case law of international criminal tribunals (starting from the Nuremberg

Tribunal), the authors conclude that IDCHH could be classified as a crime against humanity, but only if it is committed as part of a severe, repressive policy directed against a certain civilian population. Such a policy must be designed to degrade the victims to such an extent that their fundamental freedoms are systematically denied, with the discriminatory intent of the perpetrator serving as the driving force behind this criminal plan or program. Consequently, it appears evident that only within the context of a persecution campaign could IDCHH be considered a crime against humanity.

The next three chapters of Part 4 present an interesting comparison, as they center on the ICC's *Al Mahdi* case,[14] although the components of this case are assessed from different perspectives in these chapters. In the first of them, authored by Elisa Ruozzi, there is a return to a previously discussed issue: treating the international community as a "victim" of IDCHH and as entitled to compensation. However, this time the issue is viewed from the perspective of ICL. To this end, the author analyzes the role played by the international community in the reparations for the crime committed by Al Mahdi, with particular attention to whether and to what extent the attribution of the status of heritage of humankind to the destroyed property is reflected in the provisions on compensation for victims. Noelle Higgins addresses the rationales for protecting cultural heritage within the international legal system, with the backdrop of the *Al Mahdi* case and the arguments put forth by Ansar Dine in defense of their attacks on cultural sites. According to the author, while the ICC's analysis of the impact of the destruction of cultural property is important, it lacks many elements regarding Al Mahdi's motivations or justifications. This is a significant shortcoming, as understanding the rationale for the destruction of cultural property and how it is treated across various cultures and religions enables better legislative efforts for its protection. Lastly, Alice Lopes Fabris also returns to the issue of the international community as a victim of IDCHH, emphasizing that the collective interest may serve as a rationale for protecting cultural heritage. Drawing on the ICC's *Al Mahdi* case, the author examines the possible foundations for recognizing the international community as a victim of an international crime against cultural heritage. She first briefly discusses the concept of a victim in international law, then analyzes the legal basis of the ICC's ruling, particularly the determination of the harm suffered by the international community. Furthermore, she explores other situations in which, according to the ICC's reasoning, the international community could potentially be recognized as a victim.

The next chapter of Part 4, authored by Karolina Wierczyńska and Andrzej Jakubowski, presents a highly detailed and critical analysis of the Policy on Cultural

[14] *See* ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12–01/15, Judgment, 27 September 2016.

Heritage, published by the Office of the Prosecutor (OTP) of the ICC in June 2021.[15] It explores the nature and objectives of policy documents drafted by the OTP, examines the content and purpose of the cultural heritage policy in relation to the Rome Statute, and assesses its broader role within the international criminal justice system. Furthermore, the chapter scrutinizes the key elements of the policy, evaluating its potential practical impact on global efforts to prevent and prosecute cultural heritage crimes. Lastly, it situates the OTP Heritage Policy within the broader framework of multilevel governance of cultural heritage and its overarching objectives. This chapter serves as a good example of the need to approach such initiatives of international institutions with a degree of critical scrutiny – acknowledging their innovativeness and significance for the issue at hand while remaining vigilant to potential shortcomings and deficiencies.

The final chapter of Part 4, written by Chiara Venturini and Sophia Schiavon, examines the obligation of states to criminalize IDCHH within their domestic legal frameworks, highlighting the necessity and complementarity of this measure in relation to the recognition of IDCHH as a crime under international law. This obligation is analyzed through the example of the Council of Europe Convention on Offences relating to Cultural Property of 2017 (Nicosia Convention).[16] The chapter explores the Nicosia Convention to assess its future and effective implementation in international practice, as well as its prospects within the current international system for the protection of cultural heritage. Additionally, Italy is examined as an example of a state that has ratified and is actively implementing the Convention's provisions. In the authors' assessment, Italy's timely and proper enforcement of the Convention's obligations to criminalize the prohibited acts demonstrates that, through widespread ratification of this instrument, there is a genuine prospect of establishing a harmonized system for combating crimes against cultural heritage.

The final chapter, authored by Alberta Fabbricotti, can hardly be described as a mere conclusion, as it goes beyond the customary "observations and findings." Rather, it serves as a comprehensive assessment of the objectives and research questions set forth at the outset – evaluating the extent to which they have been addressed and answered and identifying those that remain within the realm of legal uncertainty or require further in-depth study. Undoubtedly, the book under review constitutes a comprehensive and analytically structured study, presenting significant research findings on the issue at hand, particularly with regard to assessing the actual effec-

[15] *Policy on Cultural Heritage*, International Criminal Court, The Office of the Prosecutor, Hague: 2021, available at: http://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf (accessed 30 June 2025). It is worth mentioning that this document was shaped during public consultations in part through contributions from the authors of the book under review.

[16] Council of Europe Convention on Offences relating to Cultural Property (adopted 3 May 2017) ETS No. 221.

tiveness of the international legal prohibition of IDCHH. However, questions arise as to whether the norms concerning IDCHH possess a customary character and whether the obligations arising from them are *erga omnes*. Furthermore, the volume highlights the shortcomings of legal systems that fail to provide effective means of protection against IDCHH. The editor and authors are thus fully aware of their research achievements and successes, as well as certain gaps and the incompleteness of the subject matter (which, in effect, leaves little room for critique by the reviewer). As with the introduction (Chapter 1), reading the final chapter is essential in order to fully grasp the rationale and outcome of the research on remedies to IDCHH, as described and analyzed in the various sections of the book.

When considering the potential reader, it should be noted that this publication has a relatively high "entry threshold," meaning that it requires at least basic knowledge of international law – if not its specific branches – to navigate the presented subject matter with ease. While individual authors clarify many issues (as far as the limited scope of their chapters allows) and supplement their analyses with extensive references to the relevant literature in footnotes, having such prior knowledge is undeniably beneficial from the outset. On the other hand, the book's subtitle includes the term "research companion," which inherently implies its primary target audience. Nevertheless, this target group is broad and diverse, and the book can successfully serve as a key reference point in the field for scholars, students, and practitioners alike. It would also be highly beneficial for policymakers and decision-makers to engage with this work, as their role is crucial in ensuring that no contemporary "Herostratus" is ever forgotten – not to perpetuate the memory of their disgraceful and reprehensible acts, but rather to guarantee that punishment for such acts remains inevitable and to uphold the effectiveness of all remedies available under international law to redress and penalize IDCHH.

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